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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1883.

No. ~~340.~~ 63

HENRY CALLENDER, PLAINTIFF IN ERROR,

vs.

CLARK E. BATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

FILED OCTOBER 4, 1884.

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1 TERRITORY OF DAKOTA, *County of Minnehaha:*

In District Court, Fourth Judicial District.

CLARK E. BATES *vs.* HENRY CALLENDER.

The plaintiff complains and alleges—

First. That on November eleventh, 1879, the plaintiff was and for a long space of time had been and still is a resident of said county, and residing at Sioux Falls with his family, and at that date was the owner and in possession of certain personal property within said county, to wit:

One lumber wagon, with the appurtenances, one double set of harness, and the contents of two loaded wagons, comprising four sacks of onions, ten bushels and twenty-five pounds of beans, eleven hundred and thirty pounds of pork, eight hundred pounds of flour, three bushels of pop-corn, four hundred and ninety pounds of butter, twenty bushels of oats, one tent, with appurtenances, one stove, four blankets, two wagon sheets, two revolvers, a lot of provisions and other articles of personal property; also thirteen bushels of
2 oats and forty-two turkeys, not a part of such contents, all of the value of five hundred and fifty-eight dollars.

Second. That on said eleventh day of November, 1879, the defendant, pretending and assuming to act as sheriff of said county under a certain warrant of attachment issued in a certain action wherein The City Bank of Minneapolis was named as plaintiff and the plaintiff herein and another, Charles Bates, were named as defendants, levied upon, seized, and took from the plaintiff's possession and forcibly carried away the above-mentioned personal property, and said property was and is exempt from attachment.

Third. That on November twelfth, 1879, having notice of such pretended levy, and within less than three days thereafter, the plaintiff, at Sioux Falls, in said county, claimed and demanded of the defendant said property, as exempt, and the benefit of the exemptions allowed by law, and the surrender and return of said property to the plaintiff forthwith, as so exempt, which was by the defendant refused.

Fourth. That afterwards and about November thirteenth, 1879, three disinterested citizens of said county, not related to either party, were selected *and* appraisers—one Ford by the plaintiff, one
3 Cochran by the attaching creditors, and one Viley by the two latter persons—and an appraisement of said property was made by such appraisers, under the direction of the defendant, as such sheriff, the appraisers having first taken and subscribed an oath before such sheriff that they would truly, honestly, and impartially appraise the property of the plaintiff herein, said Clark E. Bates, as required by law, and an inventory of said property was made by said appraisers, and the value thereof by articles and lots set down therein as required by law, showing the aggregate value of said property, less than five hundred dollars, and which appraisement and inventory was delivered to the defendant.

Fifth. That said warrant of attachment required the sheriff to

levy only upon property of the defendants therein named not exempt from levy, and did not authorize the defendant to levy upon said property of the plaintiff or any part thereof, as the defendant well knew, and after such an appraisement the defendant was under obligation to surrender said property to the plaintiff upon demand.

Sixth. That, after such appraisement was had, to wit, No-
4 vember fifteenth, 1879, at said Sioux Falls, the plaintiff again demanded of defendant said property and the surrender and return thereof as being so exempt, which the defendant then and there refused to surrender or to give the plaintiff possession of, but unlawfully and wrongfully detained from the plaintiff and converted to his own use.

Seventh. That by reason of said wrongful taking, detaining, and converting of said property by defendant, and by reason of the oppression of defendant and his misconduct in office as such sheriff as aforesaid, the plaintiff sustained loss and damage in the sum of five hundred and fifty-eight dollars, the value and worth of said property as aforesaid, and in the further sum of one hundred and thirty dollars, for the hire and expense of keeping his servants and employees and their teams, hindered and delayed for a long space of time, to wit, ten days, in the business and employment of the plaintiff, and in the further sum of one hundred and seventy-five dollars for his legal and other expenses incurred and expended by him in endeavoring to secure the return of said property, and in the further sum of three hundred and sixty dollars, loss and
5 injury in the breaking up the business of the plaintiff in which he was then engaged, and for which said property was procured and was suitable, to wit, transporting goods from Sioux Falls to Deadwood, in said Territory, and back, for sale or exchange, and carrying passengers between said places, and in hindering and delaying the plaintiff, his servants and teams, in his said business, and in depriving the plaintiff of the means of carrying on the same, and in the loss of profits in such business, in all to the damage of the plaintiff in the sum of fifteen hundred dollars.

Wherefore the plaintiff demands judgment against the defendant for the sum of fifteen hundred dollars and costs of suit.

PETTIGREW & SWEZEY,
Plff's Attorneys.

6 *Amended Answer.*

TERRITORY OF DAKOTA, *County of Minnehaha:*

In District Court, Fourth Judicial District.

CLARK BATES, Plaintiff, *vs.* HENRY CALLENDER, Defendant.

The defendant answers the complaint of the plaintiff and denies each and every allegation therein contained, except as hereinafter especially admitted.

Further answering, defendant alleges that at the time mentioned in the complaint he was the sheriff of said Minnehaha county, duly elected and qualified as such, and that by virtue of the warrant of

attachment in the complaint mentioned he levied upon and seized certain personal property, and the levy and seizure aforesaid constitute the supposed wrongful taking in the complaint alleged; that the said warrant of attachment was issued in an action then pending in this court, wherein The City Bank of Minneapolis was plaintiff and this plaintiff and Charles Bates were defendants, as copart-
7 ners, — sued upon certain promissory notes executed by them in their firm name of C. Bates and Son, and the property so as aforesaid levied upon and seized was the property of said firm at the time of said levy, and as such subject to levy and seizure by said writ of attachment.

Defendant further alleges that, as by law provided in such cases, he gave notice of the aforementioned levy to said defendants on the eleventh day of November, 1879; whereupon the defendants, as partners, claimed on behalf of said partnership the benefit of the exemption by law allowed, and claimed as exempt from the seizure and levy aforesaid the property levied upon and taken by virtue of said warrant of attachment; and the aforesaid claim is the same claim and demand as is alleged in the complaint herein to have been made on November twel*vthly*, 1879; that thereupon, after the defendants in said action made said claim and demand, this defendant notified them that he would proceed to make appraisement of the property of said partnership in the manner provided for by law, to which appraisement the said parties agreed, and appraisers were duly selected in the manner by statute provided; all of which matters fully appear by the records and files of said action in the office of the clerk of the court.

8 Defendant further alleges that after the appraisers selected as aforesaid had duly qualified as such and entered upon the discharge of their duties as such appraisers the said Charles Bates and this plaintiff, then defendant, as copartners, detained and kept from said appraisers certain of their goods and chattels, and refused to have an appraisement of all their personal property, so that from the same, if over the limitation in value, the said debtors might select the amount by law allowed, and the remainder thereof be made subject to legal process, and the appraisement proceedings aforesaid are the same, and is the supposed appraisement referred to in the complaint of the plaintiff herein.

Defendant further alleges that the personal property in the complaint described is the same in part as was levied upon by virtue of the writ of attachment aforementioned, and the same in part, upon which said Charles Bates and this plaintiff made the said claim of exemption on behalf of the said firm of C. Bates and Son; but defendant denies the allegation of the complainant as to the quantity and value of said property.

Third. For a further and separate defense the defendant
9 alleges that at the time mentioned in the complaint he was the sheriff of said Minnehaha county, duly elected and qualified as such, and that by virtue of the warrant of attachment in the complaint mentioned he levied upon and seized certain personal property, and the levy and seizure aforesaid constitute the

supposed wrongful taking in the complaint alleged; that said warrant of attachment was issued in an action then pending in this court, wherein The City Bank of Minneapolis was plaintiff and this plaintiff and Charles Bates were defendants, as copartners, — sued upon certain promissory notes executed by them in their firm name of C. Bates and Son, and the property so seized upon, as aforesaid, was liable for the debts of said firm and subject to said levy by attachment.

That the plaintiff herein and said Charles Bates were but a short time prior to the alleged seizure and taking, and for about four years preceding that time had been, copartners as C. Bates and Son, and the property in the complaint described, except some small portion thereof which was bought with moneys of said firm, belonged to said copartnership; that the said firm of C. Bates and Son had been extensive dealers in lumber and coal, and
10 until within a few months prior to October twenty-first, 1879, had always carried a very large and full stock thereof; that with the fraudulent design and intention of defrauding their creditors said firm sold and disposed of the greater portion of their said stock and so reduced the same that on October twenty-first, 1879, there remained but a small and insignificant portion of the same on hand in the yard of said firm at Sioux Falls; that, further carrying out their said fraudulent designs, said firm, on or about said day, fraudulently dissolved their partnership and divided up and parcelled out among themselves individually the property of said partnership then remaining on hand, and the property in the complaint mentioned is in part the property so as aforesaid divided; that at the time of said dissolution of copartnership the said firm of C. Bates and Son were largely indebted to various creditors, the aggregate amount of their indebtedness being about twenty thousand dollars, as defendant is informed and believes, and the total mount of visible assets at said time was not more than four thousand dollars, including sheds and buildings, and said firm were then and
11 there unable to pay their said firm indebtedness from their own property.

Defendant further denies that said property in the complaint described was exempt from levy and seizure, as by plaintiff claimed, and alleges that the said plaintiff had no right of exemption therein as an individual, in his own separate right.

Wherefore the defendant demands judgment for his costs herein.

WILKES & WELLS,
Def'ts' Att'ys.

12 FOURTH JUDICIAL DISTRICT, *County of Minnehaha:*

At a regular term of the district court within and for the county of Minnehaha, in the 4th judicial district of Dakota Territory, held at the court-house in the village of Sioux Falls, in said county, on the 14th day of November, 1882.

Present: The Honorable J. P. Kidder, judge of said court, and the officers thereof.

Judgment for Plaintiff on Trial.

CLARK E. BATES *vs.* HENRY CALLENDER.

This action being tried by a jury at a district court, held at the court-house in Sioux Falls, in and for the said county, on the 14th day of November, A. D. 1882, before the Hon. J. P. Kidder, and the jury having found a verdict for said plaintiff and against said defendant therein for the sum of fifteen hundred dollars, and said verdict having been entered in the minutes of the said court—

Now, on motion of Winsor & Swezey, plaintiff's attorneys, it is considered and adjudged by the court that said plaintiff recover of the said defendant the said sum of fifteen hundred dollars as
13 damages for the conversion of personal property exempt from attachment and sale on execution, together with costs, taxed at $28.75, making in all the sum of fifteen thousand and twenty-eight and $\frac{75}{100}$ dollars.

Done in open court this 1st day of Dec., 1882.

J. P. KIDDER, *Judge.*

Attest: CYRUS WALLS,
By H. M. ANRY, *Deputy.*

14 In District Court, Fourth Judicial District, Minnehaha County. November Term, 1882.

CLARK BATES *vs.* HENRY CALLENDER.

Appearances: For the plaintiff, Winsor & Swezey; for the defendant, Wilkes & Wells.

Reported by Theron G. Brown, official stenographer 4th judicial district of Dakota, Sioux Falls, D. T.

15 (Index to testimony omitted in printing.)

16 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

In District Court, 4th Judicial Dist.

CLARK BATES *vs.* HENRY CALLENDER.

Issue being joined, this action came on for trial at a regular term of the district court in and for Minnehaha and McCook counties, at the county-seat of Minnehaha county, Sioux Falls, on the 15th day of November, A. D. 1882, before his honor, J. P. Kidder, justice of this court, and a jury, and the following proceedings were then and there had, to wit:

The amended answer is conceded by plaintiff's counsel.

CLARK E. BATES, called and sworn in his own behalf and examined by Mr. SWEZEY, testified as follows:

Q. Are you plaintiff in this action?
A. Yes, sir.

Q. Where do you now reside?
A. At Flandreau.
Q. Where did you live in the fall of 1879?
A. Sioux Falls.
Q. At what time did you remove to Flandreau?
17 A. In the summer of 1880.
Q. How long had you resided in Sioux Falls at the time you left?
A. It must have been three or four years.
Q. What had been your business in Sioux Falls prior to the 21st day of October, 1879?
A. We kept a wood and coal yard and handled lumber.
Q. Who was associated with you in business?
A. My father.
Q. What is his name?
A. Charles Bates.
Q. Do you recollect the commencement of a suit by the City Bank of Minneapolis, Minnesota, against your father and yourself in this court about the month of November, 1879?
A. Yes, sir.
Q. Was any property taken about that time by the sheriff of this county, the defendant in this action, that belonged to you?
A. Yes, sir.
Q. State to the jury your remembrance of the taking of that property—what property was taken belonging to yourself?
A. He took a span of horses and harness and wagon, and a new harness and two loads of provisions I had loaded up.
Q. Where were those loads at the time they were taken?
18 A. Under the lumber shed we used to use that belonged to Mr. Sharp—down where we used to sell lumber.
Q. On what street?
A. On Ioth street.
Q. In what condition were those loaded wagons?
A. They were just ready to go to the Black Hills.
Q. State to the jury what arrangements you had made to go to the Black Hills.
A. I bought those provisions and things calculating to take them to the Black Hills and sell them there and return—make what I could on them.
Q. How many wagons had you loaded?
A. Two. I had made arrangements for two other teams I had hired to go with me.
Q. Do you recollect the names of the parties?
A. Mr. Perry and Mr. Hansen had two teams and a man.
Q. What was your first information in regard to this attachment against your property?
A. I had been over across the river and I came down where the wagons were, and my father said the sheriff had come down after the wagons.
Q. Did you find the property again?
A. Yes, sir.

Q. Where did you next find this property?
A. In Callender's livery stable.
19 Q. Where is that situated?
A. On the end of this main street—Phillips avenue.
Q. State now in detail as much as you can the contents of those two wagons.
A. There was a lot of bacon and hams, amounting to eleven or twelve hundred pounds, in one wagon; some flour, beans, turkeys, and butter; some other small things.
Q. Any other vegetables you think of?
A. I had onions.
Q. State to the jury how many onions.
A. I had between eight and ten bushels.
Q. Are you able to state what was the value of this produce, of this provision, at that time?
A. Yes, sir.
Q. What was the onions worth per bushel?
A. Over a dollar; $1.25 per bushel.
Q. How many beans did you have?
A. Something over ten bushels.
Q. Well, what were they worth at that time?
A. About two dollars per bushel.
Q. How many pounds of pork?
A. I think eleven hundred and thirty or thirty-five pounds—something near that.
Q. Of whom did you procure that?
A. Mr. Howard.
Q. What was it worth at that time?
A. About nine cents a pound, on an average.
20 Q. How much flour?
A. About eight hundred pounds in one wagon.
Q. Of whom did you procure the flour?
A. Emerson and Sherman, the millers.
Q. What was that flour worth at that time?
A. The half patent was selling at $3.50.
Q. How much of this was half patent?
A. I could not remember.
Q. What other grade was there?
A. The common grade and half patent.
Q. What was the common grade worth at that time?
A. I think retailing at three dollars.
Q. How much butter was there in the contents of your wagons?
A. About five hundred pounds, I think.
Q. How did you procure that butter?
A. Bought it of the farmers through the country—fresh butter.
Q. Anybody assist you in buying?
A. Mr. Soli, at Howards; Chris. Soli bought it—most of it.
Q. Did you do anything towards packing or working it over?
A. He bought it fresh, rolls; I took it up to the house and hired a lady to work it over and pack it; I bought *furkins*.
Q. How many *furkins* was there?

A. Somewhere near a dozen; I don't remember numbers.

21 Q. What was the butter worth at that time when placed in firkins?

A. Eighteen to twenty cents a pound.

Q. Any feed or grain in the contents of the wagon?

A. I had some oats on the wagon.

Q. How many?

A. Some twenty bushels or over.

Q. What was the oats worth at that time?

A. I think selling for thirty cents; I had some oats in the office that he took—father's coal office.

Q. How many oats there were taken?

A. Something over thirteen bushels.

Q. Worth about the same per bushel?

A. Yes, sir.

Q. What else had you in the wagon in the way of protections for such a trip?

A. I had some blankets and a new tent I had made.

Q. Describe to the jury what that tent was.

A. Made out of this heavy tenting; I think about 14 x 16 feet, high wall tent; we calculated to keep the four teams inside of it.

Q. Give the jury the dimensions of it.

A. I think fourteen by sixteen feet, square wall tent, with high sides to it.

Q. Was that new?

A. That was new.

Q. What was the value of the tent, poles, and ropes?

22 A. I think it costs about forty dollars.

Q. Was it fairly worth that?

A. Yes, sir.

Q. What blankets was these?

A. I think blankets worth about $2.50 apiece.

Q. Were they new blankets?

A. Comparatively speaking, yes, sir. I had two wagon sheets made to cover the wagons with.

Q. Were they new?

A. Yes, sir.

Q. What were they worth?

A. Two dollars and a half.

Q. Any stove?

A. Yes, sir.

Q. What was the stove—what value. How many wagon covers was there?

A. Two, I think; new stove I bought of Larson to go with and tinware to go with it.

Q. What was the stove and traps that went with it worth?

A. It cost five dollars or a little over—that is, the stove and tinware.

Q. Do you recollect any provisions already cooked? If so, state to the jury what it was.

A. I had a lot of provisions, enough to keep. There was four

teams and two men going with me. We had enough cooked and packed in the wagon to last us while going out. I bought the
23 provisions, and my wife cooked them and got them ready.

Q. In what were they contained?

A. I had a light box made out of three-eights inch lumber to fit the wagon.

Q. What was the value of that box and contents?

A. Must have been thirty or forty dollars' worth.

Q. Intended not only for your own, but all of their use going out?

A. I was to furnish provisions for them.

Q. Anything else that was attached down at the office or near the office.

A. Well, I had a lot of turkeys down there near the wagons.

Q. How many turkeys?

A. Forty-two down there.

Q. Dressed?

A. Yes, sir; dressed turkeys.

Q. What was those worth?

A. They cost a dollar apiece and little over; nice turkeys as we could get.

Q. For what were those procured?

A. I bought them to take with me out there.

Q. Do you think of anything else that was taken in connection with that levy belonging to yourself—any fire-arms or anything of that kind?

Def't's counsel objected that all through this examination the counsel has been leading.

24 WITNESS: There was two large revolvers. I bought one of them of Mr. Buck about a week before I left, paying twelve or fourteen dollars for it. The other one was about the same, only had been used a little.

Q. What was the other one worth?

A. Ten dollars, at least.

Q. Did I understand the team was taken also?

A. They took the team and harness that was with the team, but they brought the team back in a day or two.

Q. So the team was returned?

A. Yes, sir.

Q. And the harness that went with the team?

A. Yes, sir.

Q. Was there any other harness?

A. There was a new harness that had not been on the horses at all; they kept that.

Q. Where was that set of harness?

A. That was packed away in the wagon.

Q. The value of the harness?

A. I think about thirty or thirty-five dollars.

Q. How did you come to have that new set of harness?

A. I engaged another man and two teams, and he didn't have a harness suitable to go with. I had this harness made to order for him; then he backed out and would not go. I packed the harness in the wagon to take with me; it was new; never had been used.

Q. State to the jury what kind of wagon and value of it.

A. It was a second-hand wagon, but good.

Q. What was the value of it at the time?

A. I should think it was worth fifty or sixty dollars, anyway.

Q. Was any of this property ever returned to you, except the team and harness?

A. That was all.

Q. At this time where were you living.

A. I was living in the lower part of the town; what they call Colesburg.

Q. Had you a family?

A. Yes, sir.

Q. Of whom did it consist?

A. Wife and one child.

Q. How old was the child?

A. Five or six years old.

Q. Had you made any arrangements for their living there during the winter?

A. Yes, sir; I provided them fuel and provisions enough to last through the winter.

Q. What did you do in regard to a demand for this property after it had been taken?

A. After I found the team gone I think I came up street to your office, and you wrote out a demand and we went down and demanded the property.

Q. Look at the paper now shown you, signed Clark E. Bates, by Pettegrew & Swezey, his attorneys, dated November 11th, 1879, — see if you recognize it as the demand then prepared.

A. Yes, sir (examining paper).

Q. At whose request was that prepared and by whom?

A. I went up to your office and told you they took my stuff, and asked what could be done about it; you said——

Def't's counsel duly objected.

Q. It was done at your request?

A. Yes, sir.

Q. State what was done in regard to serving this demand upon Callender, the sheriff.

A. It was served in his livery stable.

Q. Who went with you?

A. You went yourself.

Q. Was Callender there himself?

A. Yes, sir.

Q. Was the property there?

A. Yes, sir.

Q. Where were these wagons at that time?

A. In his livery stable.
Q. How was this demand served, as you recollect?
A. I think it was read to him, or he took it and read it over, something of that kind, in the livery stable.
27 Q. Do you recollect anything about a copy being left?
A. We had a copy with us, and left it with him when we went down there.
Q. Was anything said by Callender about receiving this demand?
A. I think he said that if it was exempt property he would return it.

Demand introduced in evidence, marked Exhibit T. C. B., read as follows:

Here insert it.
See Ex. 1, attached to the back hereof.

L. I. SWEZEY, sworn in behalf of the plaintiff, testified as follows:

I wish to say that I am the person referred to as attorney in behalf of Mr. Clark Bates in this matter; that this demand was made by me at his request and is in my handwriting; that upon serving it upon Mr. Callender, my remembrance is by copy, I made this memoranda on the back of it to refresh my memory as to the time when it was served, and the memoranda is in pencil—"Nov. 11, '79;" from that and my remembrance generally I am able to state it was on November 11th, 1879, when this demand was served on Callender in the presence of the plaintiff in this action by exhibition of this paper and by serving copy, if I recollect.

28 By Mr. WILKES:

Q. Did you get any acceptance or service from Callender?
A. No, sir; it was done openly, in his livery stable; left him a copy——
Q. This was in Callender's stable?
A. Yes, sir; right in the open floor.

CLARK E. BATES, recalled in his own behalf and examined by Mr. SWEZEY, testified as follows:

Q. Mr. Bates, what further was done of your own knowledge in regard to an appraisement of this property to ascertain its value?
A. We selected one man and they choose two, and went on and appraised the property.
Q. Who was the three persons who acted as appraisers?
A. Mr. Ford, Mr. Willie, and Mr. Cochran.
Q. Were you present when the appraisement was had on your property?
A. I think I was with them; yes, sir.
Q. W-ere was your property at the time it was appraised?
A. In the livery stable, I think.
Q. Do you recollect whether the team had been returned to you or not?
A. I think it had.

29 Q. What did the appraisers do in the matter; what did you observe them doing under this appraisement?

A. Why, they just set down a memorandum of the articles, what they thought they would sell for at auction, I suppose.

Q. Were the wagons unloaded?

A. I don't think they were.

Q. Was Callender present with them?

A. Yes, sir; I think he was.

Q. Was any of your father's property present at the same time when this was appraised?

A. No, sir.

Q. Are you familiar with these papers—these papers relating to an appraisement in this case of The City Bank of Minneapolis, Minnesota, *vs.* Charles Bates and Clark E. Bates (exhibiting papers to witness). Look at the inventory contained in these appraisement papers, and state to the jury which of those items were your property; look at the items on the first page of the inventory.

A. (Examining paper.) One lumber wagon, one set of harness, contents of two loaded wagons.

Q. You observe one yoke of oxen?

A. Yes, sir.

Q. These you didn't claim?

A. No, sir; never claimed them at all.

30 Q. Look on the other page of the inventory and see if you recognize any property that was yours or appraised at that time as yours.

A. No, sir; that was all.

Q. So the items belonging to you are contained on the first page of the inventory?

A. Yes, sir.

Q. And include all the articles, except the oxen?

A. Yes, sir.

Q. Do you identify the names of those persons attached to this schedule as the names of those persons who acted as appraisers?

A. Yes, sir; Cochran, Forde, and Willey.

Pl'ff's counsel introduced this paper in evidence—the same paper which was introduced on the other trial, except the last paper, which was a subsequent inventory of Charles Bates' property, marked Exhibit "2," T. C. B.; read in evidence as follows: (Here insert it. See Ex. 2, attached to the back hereof.)

[Q.] After being served with this appraisement, and after it had been completed and certified, state whether or not you made any further request upon Callender to return this property.

A. I made verbal demand at two or three different times.

Q. When and where; what was said by Callender?

A. I think I demanded it once in the livery stable after-
31 wards, and on the street, and in Mr. Pettigrew's office. Sometimes he said he thought he ought to turn it back if it was as I said. I remember of his going to Wells'. He said he would go and talk with his attorney about it. He said Mr. Wells told him he

had better not to do it; that he would not be to any costs or trouble, and didn't want him to let it go.

Def't- counsel objected.

Q. How long before it was finally determined by Callender that he would not turn it back?

A. I don't remember. I told him in Pettigrew's office that he had ought to turn it back. He said he thought so himself, and was a notion to do it anyway. He went up and talked with Wells, and he said when he came back that Wells had given him some kind of a bond that he would not be out. He said he would not do it now. He was going to hold it as long as they wanted him to.

Q. At the time you was notified you could not have your property what men had you in your employ for the purposes of this trip to the Black Hills?

A. Mr. Perry and his team and Mr. Hansen and his two teams.

32 Q. How long were they kept in your employ waiting the result of this matter?

A. I think Mr. Perry about ten days, and Mr. Hansen some- like five days.

Q. Were you to any expense in the matter of their employment during that time?

A. I had to pay them for the time.

Def't- counsel objected that there is no foundation.

Q. At what time did you make your arrangement to go — the Black Hills?

A. Probably about the first of November. We dissolved partnership; made arrangements right away. I hired Perry to go. I was to find him on the road and give him so much for going. I hired two other men that would not go, and hired Mr. Hansen and his two teams to go.

Q. Mr. Perry was in your employ ten days with his team, and Hansen about five days with his two teams?

A. Yes, sir.

Q. Were you prevented by this attachment from carrying out your plans?

A. Yes, sir.

PLFF's COUNSEL: We offer to prove what was the actual expense for these two men who were under employ and kept temporarily pending this attachment and the appraisement of the property

33 until he was notified that it should not be returned—the actual expense that he paid in cash to these men for themselves and teams.

Def't- counsel objected.

The COURT: The objection is overruled.

Def't- counsel duly excepted.

Q. State what expense for teams and these two men.

A. When I got ready to go—when the property was attached—Callender thought he would turn it back. I told these men I would pay them until I found out whether the property would be turned back or not. I paid Perry ten days at three dollars a day; Mr. Hansen five days, the same—three dollars a day—man and team.

Q. Did you discharge them as soon as you was able to tell you would not get to go?

A. Just as soon as Callender said he would not give up the property.

By a JUROR:

Q. Do we understand Hansen had two teams and two men?

A. Mr. Perry had one mule team himself, and he was about ten days waiting; Mr. Hansen I didn't engage as soon as Perry; he had two mule teams and a hired man to work for him.

Q. The thirty dollars you paid Hansen covered the hired man and team?

34 A. Yes, sir.

Q. What time did you spend of your own?

DEF'T'S COUNSEL: What Hansen was this?

A. I could not speak his name. He worked on the railroad at the time; he lived across the river in a little house.

Q. Does he live here now?

A. I could not tell you.

Q. State how you acquired this property—take first the wagon and the old harness.

A. The wagon we had used in the business before, father and I; when we settled up I took the wagon; after settling up I concluded to go to the Black Hills; this was the only wagon we had at that time; the provisions and stuff I had only bought about two weeks.

Q. In regard to the contents of the wagons, the provision-, and produce, state who purchased it.

A. I purchased everything myself, except one or two I hired to buy for me. Mr. Soli bought butter and turkeys.

Q. Did your father have anything to do with the purchase?

A. No, sir.

Q. At what time did you dissolve your partnership?

A. I think it was the 21st day of October.

Q. What did you do towards dissolution?

35 A. After we settled up with Merriman, Barrows & Co. and others we then dissolved partnership. I called to the printing office and told Caldwell or Stahl to put a notice in.

Q. Look at the notice now shown you, with the affidavit of the printer attached, and see if it is the notice you published.

A. Yes, sir.

Q. Look at the notice and state whether there is any error in the use of the words Jr. and Sr. Explain to the jury how that matter is.

A. It said the fuel business will be continued by the Jr. member, who will collect all accounts; that is a mistake.

Q. Who was the Jr. member of the firm?

A. Myself.

Q. You didn't continue the coal business?

A. No, sir; I didn't know anything about it afterwards; knew my father was going into it.

Q. How was that notice given?

A. I went to Caldwell and wanted him to put a notice in the paper to that effect, that father was going to continue the coal business.

Q. Was it given to him orally or in writing?

A. Orally.

Q. State when you observed for the first time an error in the print.

36 A. After it had been out; I don't know what publication.

Q. Was there any partnership business carried on after the date of this dissolution?

A. No, sir.

Q. Was there any partnership property under your control after that dissolution?

A. No, sir.

Q. What was done with all your partnership effects?

A. Before we dissolved partnership we settled with Merriman, Barrows & Co.

Q. What did you do with your partnership assets upon that settlement?

A. We turned them over the lumber we had on hand—doors and windows and paper; he sold it to Sharpe, and allowed us what he got for it; I think three thousand dollars was what he sold it for to Sharp; that is what he said, and allowed us for it.

Q. What was it about accounts and notes?

A. We owed them about five thousand dollars upon settlement; we paid them about five hundred dollars in money, and had about six thousand dollars in some notes secured to us, and some liens and accounts; we turned them over to secure them.

Q. Have you ever had any of those notes and accounts back?

A. No, sir.

37 Q. Were you ever a partner with your father since the dissolution of this firm?

A. No, sir.

Q. What did you do in reference to the dividing up of your property at the time of the dissolution—what did you take and what did your father take?

A. I took a span of grey horses and an old lumber wagon and harness, and had between five and six hundred dollars in money—money I used to buy this stuff going to the Black Hills with.

Q. Who took the other property?

A. That that was left father took—the coal-sheds and office and scales—and he took some money.

Q. After that dissolution did you own any interest in this property, or he in yours?

A. Not any.

Q. Did he have any control of your business after that?

A. No, sir.
Q. Did he ever have possession of the lumber wagon after that?
A. No, sir.
Q. Did he have any interest with you in this Black Hills project?
A. Not any.
38 Q. Had you any other property left after settlement and the dissolution?
A. I had this little house and one lot where I lived.
Q. How much was that worth?
A. About four hundred dollars I think I got out of it when I went away.
Q. Had you any other personal property except your household goods?
A. No, sir.
Q. Any other team or wagon?
A. No, sir.
Q. Had you any other money except this five or six hundred dollars?
A. No, sir.
Q. With what money did you procure these goods?
A. With these five or six hundred dollars I took when we divided.
Q. Had no other personal property at that time?
A. No, sir.
Q. Except what you have told the jury about?
A. No, sir.

Q. Pl'ff's counsel offered in evidence the notice of dissolution of the firm, with the affidavit of the printer attached, Ex. 3.

Read in evidence as follows: (Here Ex. 3; insert it.)

Q. In any of these interviews with Callender did he ever make any claim that this property was more than the law allowed?
39 A. No, sir; he said he thought it was right to turn it back.
Q. What reason did he assign from time to time for not returning the property.
A. Why the attorneys on the other side did not want him to do it; at last they gave him a bond that would exempt him from all costs and trouble, and they wanted him to hold it, and he was going to do it.
Q. How many times did he indicate to you that he was willing to do so—to turn back the property?
A. As many as three or four times at least; might have been he talked it three or four days, several times a day; he always said he thought it ought to be turned back, but was inclined to do as the attorneys in the bank case wanted him to.
Q. At the time of the appraisement who took charge and directed in the matter?
A. Mr. Callender, I think.
Q. Were you present at the time it was appraised?
A. I was there; yes sir; I went with them.

Cross-examination by Mr. WILKES:

Q. How long had you been residing in Sioux Falls at the time of the dissolution of the copartnership?

A. Must have been about three years, I think.

Q. Had you and your father been in partnership during that time?

40 A. We had been from the time we came into the Territory until we dissolved.

Q. How many years had you been in partnership?

A. About three years, I suppose.

Q. State in detail how many pounds there was of this bacon and ham that was taken.

A. Why, there was 1,130 or 1,135 pounds, I think.

Q. Where did you get that bacon?

A. Bought it of Mr. Howard.

Q. What was the price you paid for it?

A. I think I paid about nine cents.

Q. Can you state exactly what you paid?

A. As near as I can remember, yes, sir.

Q. Then, you don't remember exactly?

A. To the best of my remembrance it was about nine cents.

Q. Might have been nine and one-half or eight and a half; you would not be positive on that point?

A. Might have been a quarter of a cent one way or the other.

Q. Might have been seven?

A. I don't think it was.

Q. It might have been?

A. It might have been nothing.

Q. Then you are not clear on that point—what you paid for it?

A. As near as I know, it was nine cents; I knew at the time.

Q. You don't remember exactly at this time?

41 A. No, sir; I don't remember exactly what I gave for it.

Q. You say there was some flour, beans, and butter. How many pounds of flour was there?

A. I think about eight hundred pounds of flour in the wagon.

Q. Do you remember exactly how much flour there was?

A. Eight hundred, I think.

Q. Have you the bill of purchase of that flour?

A. I don't know as I have; I guess not.

Q. Have you had them with you at any time during the progress of this trial?

A. No, sir.

Q. Then when you state there was about eight hundred pounds of flour do you state that as the best of your remembrance?

A. I knew at the time; when I made the demand I had the exact amount. We have the demand now; that had the exact amount in it; eight hundred pounds, I think.

Q. What kind of flour was this?

A. Part of it half patent and part common flour.

Q. Do you remember what portion of it was half patent and what portion was common flour?

A. I do not; I know I bought some of both kinds.

Q. You say there was some pork and bacon and, besides
42 that, some beans; how many beans was there?

A. Something over ten bushels.

Q. Do you remember where you got those beans?

A. I bought them in the country; few at a place; probably a bushel or two bushels of anybody that came in town with them.

Q. When did you buy them, before or after the dissolution of partnership?

A. Afterwards.

Q. Here in town?

A. Some of them were bought in the country; Mr. Soli might have bought a few; I could not say; I picked them up a few in a place.

Q. Can you remember what you paid for those?

A. I think about two dollars a bushel.

Q. Can you remember so as to state exactly what it was?

A. I may have paid a little over two dollars a bushel for some and a little less for some. I think it would average about two dollars a bushel.

Q. You say there was some onions. How many onions was there?

A. I think four sacks—about ten bushels.

Q. Do you know what you paid for the onions?

A. Some of them a dollar and some of them $1.25—about that price.

Q. You say there was also some butter?

A. Yes, sir.

Q. How much butter was there?

43 A. Between four hundred and ninety and five hundred pounds, I think.

Q. Was that butter in *furkins*; what shape was it in at the time of the seizure by the sheriff?

A. I had it packed in *furkins*.

Q. Where did you get that butter?

A. Bought it, fresh roll butter, at different places; I could not tell the number of places.

Q. Did you buy it traveling through the country?

A. Mr. Soli bought the butter.

Q. Didn't you buy the butter of Howard—C. K. Howard?

A. No, sir?

Q. Didn't you get it at C. K. Howard's store?

A. No, sir.

Q. What was that butter worth a pound?

A. I think about eighteen cents for some and twenty cents for some.

Q. How many bushels of oats was there?

A. Over twenty bushels in the wagon and some in the office.

Q. In what office?

A. Father's coal office.

Q. Was that the same office where you had always been doing business as a partnership?

A. Yes, sir.

Q. Where were these beans and onions you have mentioned
44 delivered to you; were they not also delivered at that office?

A. It might have been.

Q. Any of them delivered at that coal office?

A. Might have bought some on the street and set them in there for a little while; I took them up to the house; packed the wagons at the house.

Q. You mentioned some turkeys, where were they?

A. I had them hung in a shed; we kept doors and windows in.

Q. Where were they?

A. Hung in a shed Mr. Sharpe owned at the time—shed we formerly used for doors and windows.

Q. Adjoining this office?

A. No, sir; it was close together.

Q. In the yard you had been formerly doing business in?

A. Yes, sir; in the shed we had kept doors and windows in?

Q. Was not this shed right back of and in the rear of this lumber office?

A. Yes, sir; south of the lumber office—next to it.

Q. Now, you say you had a lot of provision- for men; for how many men did you pay?

A. There was six going together, with myself.

Q. These all going with your outfit?

A. Yes, sir; four teams and two men going as passengers;
45 they was to give me twenty dollars apiece to take them through and I was to board them.

Q. Were all these teams loaded at the time?

A. Mr. Perry's team was loaded and my own team loaded.

Q. You had not yet loaded the other team?

A. No, sir.

Q. Whose teams were those others?

A. This man, Mr. Hansen's.

Q. And the other?

A. He had two teams.

Q. You hired him to make this trip?

A. Yes, sir.

Q. You had not bought the stuff for his loads there at the time?

A. No, sir; I had contracted for it.

Q. Were the prices agreed upon you was to pay for it?

A. Yes, sir; I think we had. I knew where we were going to get it.

Q. But you had not paid for it yet?

A. No, sir.

Q. Do you mean to say that you had so far contracted for them that you, in fact, had anything to pack the other loads with?

A. I calculated to pack these other two wagons with provisions the same as the other two teams.

Q. Yet you had not bought them?

A. I had contracted for it.
46 Q. Agreed upon the prices you was to pay for the stuff?
A. Yes, sir; might have been a little difference in some.

Pl'ff's counsel objected as immaterial.

Q. You say you had hired these other persons to go, do you?
A. I had hired Mr. Hansen and two teams; yes, sir.
Q. After this attachment you had them on your hands at your expense, waiting to see if they would go or not?
A. Yes, sir.
Q. How much were you to pay them for the trip?
A. I was to pay them something like four dollars a hundred for hauling.
Q. What did you intend to load with?
A. Little of everything.
Q. Provision- generally?
A. Yes, sir; I think Mr. Hansen was to have three and a half a hundred.
Q. Were you going to load with the same character of goods you was loading the other two wagons?
A. I was calculating to put some corn-meal and flour on.
Q. You say, also, there was two revolvers?
A. Yes, sir.
Q. And a new harness?
A. Yes, sir.
47 Q. Where was that new harness?
A. In one of the wagons that was down there.
Q. What was the value of the harness?
A. Thirty or thirty-five dollars, I think, it cost.
Q. Where was this harness at the time levy was made?
A. In the wagon, I think.
Q. Wasn't it in the coal office?
A. I think it was in the wagon.
Q. What was that harness worth?
A. Thirty or thirty-five dollars.
Q. Do you know how much it was?
A. I don't remember certain.
Q. You say that on the 21st day of October you made a dissolution of partnership that had existed between yourself and father?
A. I think it was the 21st day; pretty close to it any way.
Q. At the time this notice of dissolution was so published, was — following that dissolution?
A. Yes, sir.
Q. You say that notice, as rendered there, "Junior member would continue the coal business," that is not correct?
A. No, sir.
Q. You did, in fact, continue the coal business?
A. My father.
Q. You say at the date of this dissolution you had a settlement with Merriman, Barrows & Co.?
48 A. It was a few days before that.

Q. About that time; about the 20th of October?
A. Eighteenth, or ninteenth, or twentieth, I don't remember.
Q. You state you were indebted to Merriman, Barrows & Co. at the time you made settlement?
A. Yes, sir.
Q. How much were you indebted; in what shape was the indebtedness?
A. Notes and accounts; some notes and some open accounts.
Q. How much did the open account amount to; how many thousand dollars?
A. I don't remember?
Q. State about how much.
A. Might have been four or five thousand dollars.
Q. How much did the notes amount to?
A. I think the notes was eight thousand dollars, as near as I can remember.
Q. Who else were you indebted to besides Merriman, Barrows & Co.?
A. I think we owed one lumber firm one hundred dollars for a car of lumber.
Q. What firm was that?
A. Bassett owed C. M. Nelson, I think, a couple hundred dollars; something like that.
Q. Who else?
49 A. Might have owed another firm a couple hundred dollars; something like that.
Q. Anything to another firm named Washburn & Co.?
A. Yes, sir.
Q. How much?
A. I think three or four car-loads; I don't remember.
Q. About six hundred dollars?
A. I don't think it was quite that.
Q. What do you think it was?
A. Might have been about five hundred dollars; might have been a little over.
Q. You say you made demand for this property of Mr. Callender after he took it?
A. Yes, sir.
Q. And that that demand was in writing?
A. Yes, sir; made a written demand and verbal demand several times.
Q. Who was present when that demand was made?
A. Mr. Swezey.
Q. Who else?
A. Mr. Callender; I don't remember whether anybody else or not.
Q. Was your father there?
A. I don'think he was when I made my demand.
Q. Was there two demands made?
A. Not at the time mine was made.
Q. Where was this demand made?

50 A. I made my demand in the livery stable—Callender's livery stable.

Q. Who served the paper?

A. I don't remember whether I gave it to him or Mr. Swezey; we were both together.

Q. What was the date this demand was served?

A. I think it was the 11th of November, if I remember right; of course I might not get the exact date.

Q. After the demand was made did you have any conversation with Mr. Wells, the attorney here, about the appraisement that was to be made?

A. I don't think I ever had any conversation with him.

Q. After the demand was made what was done then?

A. There was an appraisement had.

Q. Was this W. T. Perry whom you named as one of the appraisers the same W. T. Perry who was going with you to the Black Hills?

A. Yes, sir; he didn't act as one of the appraisers, I don't think.

Defen't's counsel offered in evidence also this second inventory of attached property, together with what has already been introduced by Mr. Swezey.

Pl'ff's counsel objected as not proper cross-examination and as not effecting the case at all.

51 DEF'T'S COUNSEL: We withdraw the offer at present.

Q. After this seizure of property that you have mentioned was there any other property taken from you?

A. He took all my property at once except the team. I think he went up to the house and took the team and brought back the next day.

Q. What kind of a team was that?

A. Span of gray horses.

Q. Was there a span of white horses taken—that the team you mean?

A. That is the team he took and returned.

Q. Was that all taken at the same time of the first levy?

A. The team was at the barn and the wagon under the lumber shed.

Q. Was it all taken at the same time?

A. I don't know. He might not have got the team until the next day; might have got it that day. I think——

Q. Well, do you know?

A. I think it was the next day.

Q. The next day, was there some oats taken?

A. Not that I remember of; no, sir.

Q. Do you know whether there was any plows taken?

A. He took some plows that were in the barn at the time he took the horses.

52 Q. What did he do with the plows?

A. He brought them back the same time he took the horses.

Q. Do you know why he returned them?
A. He didn't say anything to me.
Q. You didn't have any talk with him about that?
A. No, sir.
Q. Did he also take a breaking plow?
A. I don't know; the plows were all together; there was five or six plows altogether.
Q. They were in your barn?
A. Yes, sir. He had been handling plows and turned them over to the plow company.
Q. When?
A. I don't remember the date.
Q. Before the dissolution?
A. Yes, sir. I think it was or shortly afterwards; they was to go to the plow company.
Q. They was to go to the plow company?
A. I think so.
Q. Who did this span of white horses belong to?
A. Belonged to me.
Q. Do you know why Callender returned the horses?
A. No, sir. He never told me why he returned them; never said anything to me one way or the other.
Q. Did you own these horses at the time of the appraisement?
53 A. Yes, sir. I don't think the horses was appraised; I don't think.
Q. You owned them at the time of the appraisement?
A. Yes, sir.
Q. Where were they at the time of the appraisement?
A. I don't remember; I think up in the stable; I could not tell for certain.
Q. They were here in Sioux Falls?
A. Yes, sir.
Q. Were you present at the appraisement that occurred at the livery stable?
A. Yes, I was there; I had no hand in it; I was there.
Q. What did the appraisers do?
A. They just made a memorandum of it—of the goods—amount of goods; lumped it off some way; talked it over among themselves what they was going to put it at.
Q. Was there any other property than yours there at that time that was appraised?
A. At the stable they had a yoke of cattle, but I had nothing to do with these. I don't know whether they appraised them or not; don't know anything about them.
Q. What kind of a yoke of cattle was that?
A. Yoke of oxen.
Q. Were those yours?
A. No, sir.
Q. To whom did they belong?
54 A. I could not tell you. I don't know.

Q. You say they were appraised?
A. No, sir. I don't know whether they were appraised or not.
Q. I understand you to say on your examination-in-chief you looked over this that belonged to you?
A. Yes, sir.
Q. Do you know to whom the other property belonged that was appraised?
A. I do not.
Q. Was that yoke of cattle going to the Black Hills with your party?
A. No, sir; not that I was aware of.
Q. Did you ever see that yoke of cattle before?
A. I think I saw them once before.
Q. Where?
A. At my father's stable.
Q. When was that?
A. Before this; I don't know what time before; he had them up there.
Q. Your father had them?
A. Yes, sir.
Q. Do you know how long he had had them? State as near as you can.
A. A week or ten days, possibly.
Q. Ever had any talk with him about cattle?
A. No, sir.
55 Q. Do you know whether those cattle belonged to your father or not?
A. No, sir; I do not.
Q. Yet you had seen them in his possession for some time?
A. Yes, sir; I remember seeing them there.
Q. You had seen them at his barn and then you saw them down at the livery stable at the time of the appraisement?
A. Yes, sir.
Q. Did you hear the appraisers say anything about those cattle?
A. No, sir.
Q. You have no knowledge as to whom those cattle belonged?
A. No, sir.
Q. Was not one of those wagons that was there—was not it furnished with a chain, as if to be drawn by oxen instead of horses?
A. It was not so in my possession, unless Callender fixed it up so.
Q. Among these other articles, to whom did these hay-scales belong?
A. Belonged to my father.
Q. To whom did these eight barrels of coal belong?
A. He had coal down there; I suppose it belonged to him.
Q. To whom did the old wagon and harness belong?
A. I don't know what wagon you refer to. I had a wagon and he had a wagon.
56 Q. Was your wagon a new one?
A. It was a second-hand wagon.
Q. What was the value of it?

A. It must have been worth at least fifty or sixty dollars; good, heavy wagon.

Q. To whom did the span of sorrel mares belong listed in this appraisement?

A. To my father.

Q. At the dissolution of this copartnership you say you took some horses; which horses did you take?

A. Span of old gray horses.

Q. It was not the bay horses mentioned in the appraisement—the sorrel horses?

A. I had nothing to do with them.

Q. You also took a wagon?

A. Yes, sir.

Q. That is the wagon you mentioned as second-hand?

A. Yes, sir; the wagon I claim.

Q. And a harness; was that the new harness to which you have referred?

A. No, sir.

Q. What sort of a harness was it you took on the dissolution?

A. It was the harness that went with the gray horses.

Q. Second-hand harness?

A. Yes, sir.

57 Q. How much money did you say you had on dissolution?

A. Probably five or six hundred dollars; might have been six hundred dollars.

Q. You don't remember exactly?

A. As near as I remember, about six hundred.

Q. Your father also took some?

A. Yes, sir.

Q. How much money did your father take?

A. I think somewhere about eight hundred dollars.

Q. Did you have any property of your own attached except the contents of these two loaded wagons, this one second-hand lumber wagon and the set of new harness, and these provisions you have mentioned; did you have any other property than this attached and taken that you claimed?

A. Some oats in father's office and oats on the wagon.

Q. The oats in your father's office had not been removed yet?

A. No; it was there.

Q. It was not at the time of the appraisement at the livery stable, was it—these oats?

A. I think they were at the livery stable; there was some oats on the wagon when he took them.

58 Q. You state another portion were in the office; they had been taken from the office and carried down to the barn at the time of the appraisement?

A. I don't remember whether they were or not?

Q. State your best recollection whether they were or not.

A. I don't remember.

Q. Were they in sacks or loose?

A. I don't remember. I had them in sacks, if they had not been emptied by somebody.

Q. Do you know whether these oats in the office were included in the appraisement?

A. Yes, sir; I think they were.

Q. Did the appraisers go from the livery stable up to the office to do any appraising, that you know of?

A. I don't remember.

Q. What makes you think, then, they were included in the appraisement?

A. I supposed they appraised everything that belonged to me—that is, the time they went to do it. I supposed they appraised everything that belonged to me.

Direct examination resumed:

Q. There was some oats in one of the wagons at the livery stable, then some at the office?

A. Yes, sir; I had some on the wagon loaded and some in the office that we had not loaded yet.

59 Q. The loaded wagon was near the office?

A. Yes, sir; in a shed back of the office; put them in there to keep them out of the damp.

Q. You speak of some plows turned back to the plow company. At the time of the levy was Callender informed you didn't claim the plows, or shortly after the levy do you know whether he was informed by you or anybody you made no claim to the plows?

A. I never informed him I didn't claim the plows. I think they belonged to the company at the time.

Q. The goods you had on hand belonged to the plow company?

A. Yes, sir.

Q. Did I understand that the old harness—the one with the gray horses—was returned with the horses?

A. Yes, sir.

Q. Was this team mortgaged at the time?

A. Yes, sir.

Q. Harness, too?

A. Yes, sir.

Q. One little item mentioned in your demand—pop-corn—that you have not mentioned; was there any such goods?

A. I think three sacks of pop-corn.

Q. How much in quantity?

60 A. Might have been three or four bushels; I think it was in three gunny sacks.

Q. What was it worth?

A. I think about three dollars.

Cross-examination by Mr. WILKES:

Q. Who do you say it was continued the coal business?

A. My father.

Q. Just examine that book (exhibiting book) and state whose handwriting that is at the top of the page.

A. My handwriting, sir.

Def't- counsel offered in evidence this first page, which the witness identified as his handwriting at this time, as proper cross-examination of the witness.

Pl'ff's counsel objected as immaterial and not cross-examination.

The COURT: The objection is overruled.

Pl'ff's counsel duly excepted.

Marked Exhibit "C," T. C. B., so much of it as is in brackets, and read in evidence, as follows: (Here insert it. See Ex. "C," attached to the back hereof.)

Direct examination resumed by Mr. SWEZEY:

Q. This book, just now shown you, was it a book pertaining to your business at all?

A. No, sir.

Q. Whose business was it?

61 A. Father's. He had bought a book and expected to go — with the coal business. He was expecting a man to come and do business with him and keep books. I was in the office one day, and he asked me to stay and work for him half a day or so; he was up and done some work around my house for me. I made that handwriting at his request at that time.

Pl'ff's counsel offered in evidence the summons and complaint and warrant of attachment and return of the sheriff therein in the case of The City Bank of Minneapolis, Minnesota, *vs.* Chas. E. Bates and Clark Bates; read in evidence, as follows: (Here insert it, Ex. 4. See Ex. "4," attached to back hereof.)

CHARLES BATES, called and sworn in behalf of the plaintiff, and examined by Mr. SWEZEY, testified as follows:

Q. W-ere do you reside?

A. In Moody county, town of Flandreau, Dakota Territory.

Q. Where did you reside in the month of November, 1879?

A. Up in Galesboro, upper part of town.

Q. Are you acquainted with the parties to this suit?

A. Yes, sir.

Q. What relation are you to the plaintiff, Clark E. Bates?

A. He is my son.

Q. Were you in Sioux Falls at the time the attachment

62 was taken out against yourself and your son in the suit of the City Bank of Minneapolis, Minnesota, against yourself?

A. Yes, sir.

Q. What was the first information you had in regard to this attachment on Clark Bates' property?

A. Mr. Callender, the sheriff, came down to the office on Ioth street. I was there. He came down to the office. I was in the office. He came to the office door and said he had an attachment for Clark E. Bates' property and wanted me to show it to him. I wanted

to know what it meant. He said the Minneapolis Bank had come down or sent out attachment papers; if I would show it to him he would not get any property that didn't belong to him; it would be a favor if I would show him Clark Bates' property. I showed him two wagons that stood under a shed; took him into a shed where we used to keep doors and windows and showed him some turkeys. He went into the office and took a lock and key and went out and lo-ked the door. There was a harness that had been laid off in the office and some oats; I showed him them. Whether he put them on the wagon I don't recollect. I don't recollect; there might have been some other. I sorted out the property.

63 Q. Did he at that time ask for any property of your own?

A. No, sir.

Q. Did you at that time know of an attachment against you?

A. No, sir; he did not say he had any against me.

Q. Was there any levy made against you at that time?

A. No, sir.

Q. Was there some later?

A. This was in the morning. I guess, three or four hours after that, I came up to see some of the men in regard to delivering coal; when I went back the office was locked up. He told the man that was at work for me to go home; he had attached the stuff, nailed up some of the sheds.

Q. What did Callender do with those two wagons and contents?

A. Some time during that day he fetched some teams or sent some, and took them off that forenoon.

Q. What become of the oats and harness that was in the office which you pointed out to him as belonging to Clark E. Bates?

A. The day or so after he came down there and got it—this in the office; whether he took the harness that day and laid it

64 on the wagon, I can't say.

Q. You saw him taking the oats?

A. I went with him there, probably the next day. I would not be positive. I seen him there.

Q. Do you know what was done with the turkeys?

A. I don't know. I suppose he took them off.

Q. How long had these wagons been there under the shed at the time they were levied upon?

A. Well, maybe a day—maybe two days; he had been gathering up stuff to load them with; he fetched them down there and put them in the back sheds out of the storm.

Q. Where was he proposing to go at that time with those wagons?

A. Black Hills, at that time.

Q. By what route?

A. I don't know; I suppose West; I don't know as he said; the wagon road, of course; that was the direct road through.

Q. At the time of this attachment had you any interest in this property you pointed out as belonging to Clark Bates?

A. No, sir.

Q. Had you ever anything to do with this outfit to go to the Black Hills?

A. No, sir.

65 Q. Did you make any purchase of the goods contained in the wagon?

A. No, sir; I did not; but a man fetched a crock of butter there one day and said my son wanted him to leave it in the office.

Def't's counsel objected to what the man said.

Q. Do you know how Clark Bates acquired the wagon?

A. Well, the wagon we had in our business when he was in company together, when we dissolved partnership, he took the wagon.

Q. When did you dissolve partnership with your son?

A. Some time two or three weeks before that time; I am poor to recollect dates, as I have stated to the court.

Q. Do you remember of this publication in the paper (indicating)?

A. My son went up and had one; after awhile we found a mistake.

Q. In reference to the time, to the date of that notice, when was the dissolution, in fact, between you?

A. It was just before the dissolution was printed; a few days; we looked over our affairs.

Q. After the dissolution did you carry on any partnership business—with the coal business?

A. No, sir.

66 Q. Did you have any interest with him in any property?

A. No, sir.

Q. After the dissolution what transpired between you and him in regard to the property that you had not turned over to the creditors?

A. He took a wagon and horses and harness that belonged to these horses and 5 or 6 hundred dollars in money; I forgot—we had been straightening up little bills around town in money.

Q. What in general did you take?

A. I took the coal-office and coal-sheds and a little bit of a granary that stood there and baskets and shovels and some coal and some money.

Q. Were you present at the time the appraisement was had of Clark Bates' property at the livery stable?

A. I think I came along down there about that time.

Q. Did you take any part in the appraisement?

A. No, sir.

Q. Was any of your property present at the time, at the livery stable?

A. No, sir.

Q. Do you know whether the appraisers viewed all these articles at the sheds in connection with the appraisement?

67 A. They went off; I didn't go down with them; I supposed they went down to look at the dressed turkeys. I didn't see them take them away. I was down there the first day; they was locked up, and I had no right to go in there.

Q. State whether there was a subsequent appraisement made of your property by these same appraisers.

A. Yes, sir; if I recollect right, it was the next day; of course the papers may show different; my recollection is it was the next day, in the forenoon.

Q. What did the appraisers do in regard to appraising this property of Clark Bates?

A. I went along down probably after he had; it strikes me I was down there; they was down there looking about the wagons; of course I don't know what they did do with it; I don't remember; I didn't want to interfere about it.

Q. Were you present at any time, pending this appraisement or after the appraisement was made, in Pettigrew's office when some conversation occurred between Clark Bates and the sheriff?

A. Yes, sir; Mr. Callender came in there and Clark spoke to him. Mr. Pettigrew spoke to him, Why not turn back the property as long as he had no right to hold it. Mr. Callender said he didn't
68 think he had any right to hold it, but would go see his attorney again; he came back and said he would wait a little while. The next day he was in there again; he said he thought he onght to turn it back; he would go and see his attorney again; he came back and said they had given him an indemnifying bond and he would hold it.

Q. At that time you had stopped business?

A. Yes, sir; he had locked up my business.

Q. How much of the time were you at Pettigrew's office during those several days?

A. About two-thirds of the time for three or four days.

Q. Were you acquainted with the value of the wagon taken?

A. Yes, sir; about $65.00; it was a wagon made in a small shop—made to order; good, solid, spindle-thimble skein wagon; been used four or five years; nothing broken about it; fel-oes all complete, good and sound. I would consider it worth more than those factory wagons that stand in a rain storm and fall down the next day. I consider it worth $65.00; it had a box-brake, whipple-trees, and neck yoke—just such a wagon as you would require to go to the hills with a load; you would not want to start off with a poor old wagon.

69 Q. Do you know this set of new harness that was in the wagon at the time when Callender came down there?

A. It strikes me he was in the office; I saw it; whether he took it in the wagon, I am not positive about that; it was a harness he had got for another man that he had hired that didn't have one then; he didn't go, and the harness was in his hands; I never examined it close.

Q. Are you able to tell the value of that new harness?

A. They were selling from $28.00 to $35.00—good work harness; I don't know whether the harness was bought here or not.

Q. State to the jury, as far as you remember, what was in these wagons at the time they were taken—the nature of the goods.

A. As near as I know, I know he had been having butter bought,

buying some himself; Chris. Solie had been buying these turkeys; he had bought some flour, some onions, some beans; he bought some bacon, I call it, some shoulders, and a lot of hams; I seen it in the livery stable; how many pounds I would not be able to say.

Q. Are you able to state what butter was worth—such butter as was contained in those firkins at that time?

70 A. Twenty cents a pound.

Q. What was bacon, hams, and shoulders, such as contained in the wagon, worth?

A. I suppose, nine to ten cents a pound; I don't know how he bought them.

Q. Were you familiar with the price of these things at that time?

A. Yes, sir; we paid ten cents and a shilling for pork, hams eighteen cents a pound at retail, probably worth ten to twelve cents.

Q. What was flour worth at that time?

A. I had to buy flour to use; they charged $3.50 — those grades flour; $4.00, half patent; $3.50 sometimes.

Q. At that time where was Clark's family living?

A. Up in Galensburg, Gales' addition, in a little house there that belonged to him.

Q. What property did you know of his having besides that was taken at the time?

A. I don't know of any, only the house and lot.

Q. What was the house and lot worth?

A. Four hundred dollars or four hundred and fifty dollars, along there, at that time.

Q. Had Mr. Bates a family at that time?

A. Wife and one child.

Q. Where were they to remain during his absence?

A. In the house in Gales' addition there.

71 Q. Do you know of his making any provisions for their remaining there during the winter?

A. Yes, sir; I know he had a box of coal and some wood. I suppose he had got something for them to eat; I suppose he had. He expected to be gone to make a trip. I don't know how long he would be gone.

Q. Do you know the condition of those plows that were levied upon at the same time; if so, state to the jury.

A. We was selling plows, and the last time when we got those plows I said I didn't think we would want any more, when the agent was there. We had some plows on hand, and when we went out of business we turned the plows back to the company.

Q. At the time he made the levy, did those plows belong to you, or either of them?

A. No, sir.

Q. After the dissolution, had you any interest in the gray team?

A. No, sir.

Q. Or in the wagon or harness?

A. No, sir.

Q. Have you ever associated with Clark Bates in business since then?

A. No, sir.

Cross-examination by Mr. WILKES:

72 Q. Did I understand you to testify that you were present at the time these appraisement proceedings were had at the barn of Callender?

A. I was down there through part of it. I didn't go down when the rest do. I think I got there before they left there; pretty sure I was there before they got through—at the appraisement of Clark Bates.

Q. Was there any other appraisement had, any other than that made by Forde, Willie, and Cochran?

A. No, sir; not that I know of.

Q. Do you know of any other appraisement at any other place?

A. When my property was appraised there was a part of it at the barn of Culbertson and part at the coal office. Clark Bates was down to Callender's barn.

Q. Who else was there?

A. Mr. Swezey, Clark Bates, and Callender, and Mr. Wells, I think, and perhaps some other gentlemen.

Q. Did you have anything to say during the course of that proceeding?

A. Not down there.

Q. Did you have any words with Callender about it?

A. I had some words with Callender at Pettigrew's one day about turkeys.

73 Q. Were you present when the oxen that was named in that appraisement was appraised?

A. Yes, sir; I think I was.

Q. Did that occur at the barn?

A. No, sir.

Q. Where were the oxen?

A. Out in a yard by the river?

Q. Was not that in the barn-yard of this barn; attached to this barn and back of it?

A. I don't know; they were in the yard down by the river; it was not in the barn.

Q. Did you have any words with Callender at that time; did you use any harsh words towards Callender at that time?

A. No, sir; I did not.

Q. You did not get out of temper there at that time?

A. No, sir.

Q. Talk to him in a harsh manner?

A. I would like to explain: I said this was a pretty place to keep attached oxen, belonging to another man, with nothing to eat; that they had no right to keep them that way; said so then and say so now.

Q. Was that all?

A. Yes, sir.

Q. You said that part of these appraisement proceedings was had at another place; where was that?

A. Up in Culbertson's barn.

74 Q. What was up at Culbertson's barn?

A. My sorrel mares and wagon.

Q. Who put them there?

A. I don't know; did not see them put there; they was there all the same.

Q. Where were the oxen taken from?

A. My stable.

Q. By whom?

A. I don't know.

Q. At the time these proceedings were commenced were the papers in the case served upon you?

A. I suppose they was; I believe they was.

Q. Where—at your house, on the street, or where?

A. At my house, if I recollect right.

Q. At the time of the dissolution of this copartnership, what property did you take, and what did Clark E. Bates take?

A. I took the coal-sheds and coal-office and scales and some coal that was in the sheds; the wagon and team never was in the business; I didn't take it, because they was always mine; didn't belong to the business.

Q. They had been used in the business?

A. Yes, sir.

Q. Hauling lumber and coal?

A. Yes, sir.

Q. What else did you take—take any money?

A. Yes, sir.

75 Q. How much money?

A. I think some seven or eight hundred dollars; between seven and nine hundred dollars; I don't recollect what it was.

Q. What did Clark Bates take?

A. Five or six hundred dollars; he took the gray team and the wagon that has been in suit here—that second-hand wagon and harness with the team.

Q. Anything else that you recollect of now?

A. I don't think of anything now.

Q. State to the jury the terms of the partnership existing between you and Clark Bates; how did you go into partnership—what was your terms?

A. When we came out to Dakota he had some money, and I had some that was mine; he was to have half, if I recollect right, of what we made.

Q. He had some money, you say?

A. Yes, sir.

Q. How much?

A. I think about six hundred dollars—five or six hundred dollars; of course we had to get things to use outside of that.

Q. Did you testify, in the case of Charles Bates *vs.* Henry Callender, that Mr. Clark Bates didn't have any capital and that you took

him and gave him a share of the profits, at the last term
76 of this court?

A. I don't recollect that I did.

Q. Did you start in the business as equal partners?

A. I don't know as I would consider it so; I had a little means; of course I kept collecting in from the place I come from, and used it in the business.

Q. Was he to have half of the profits?

A. I believe he was.

Q. You didn't start in as equal partners?

A. Of course I had more than he had in there.

Q. Did you testify on the trial of the case of Charles Bates *vs.* Henry Callender "that he, Clark Bates, was young and had nothing to commence with; I told him he could have half that we could make?"

A. I can't say, we have testified so much; been in court for the last three years."

Q. At the last term of court—did you so say?

A. I can't say.

Q. How much did you put into the business when you first started together?

A. About one thousand dollars, perhaps.

Q. And Clark Bates put in six or seven hundred dollars of that?

A. Put in about that when we first started; he had about that; we kept collecting in little debts along; never kept track on
77 account of how much *much* I had put in. As I collected money down in Iowa, where I came from, why, I put — in the business. Being a son, of course I was not particular. If he had been a stranger of course there would have been strict account kept of how much he put in along.

Q. Did he ever put in any more money afterwards at any time during the two or three years you were there?

A. Not after a short time; he got a little along at first; some little notes and accounts that belonged to him he put in the business went into the coal and lumber —.

Q. When it come to the time of dissolution of the partnership, how did you divide up; did you divide equally?

A. No, sir; I took the most, being the oldest; he was youngest—more able to knock around. I would be entitled to the most.

Q. At the time of this dissolution of partnership was your firm indebted to the firm of Palmer, Leslie & Co.?

A. Not that I know of. I don't recollect hearing the name before.

Q. Were you indebted to a firm named Washburn & Co.?

A. Yes, sir.

Q. C. M. Nelson & Co.?

—. Yes, sir.

Q. M. Barrows & Co.?

A. Not one cent's worth; we had a settlement with them.
78 Q. Were you indebted to a firm named Parker & Co.?

A. Yes, sir.

Q. Were you indebted to a firm named Carr, Stufton & Co, Dubuque?

A. I think that is the name of a firm we had owed a little.

Q. Have those accounts been paid?

A. No, sir.

Q. You have stated that upon dissolution of this copartnership you continued in the coal business?

A. Yes, sir.

Q. And that that notice of dissolution referred to, offered in evidence, stating that Clark Bates, the junior member of the firm, would continue the business, was not a correct notice?

A. No, sir; it was not correct.

Q. Is that book a statement—is it a book of sales you opened to commence with at the time you started that coal business?

A. Yes, sir; I suppose it is—(examining book).

Q. That is a statement of the capital that was on hand at the time that business was started?

A. I suppose so; what money I had on hand. I was expecting a man there to help me, but he didn't come, as he agreed to; what I put in there I wrote myself, calculating to have it drawed off in shape. Clark Bates—he was there a part of the day, as he stated, to help me, and I went up to his place and done some work for
79 him around his house.

E. W. CALDWELL, called and sworn in behalf of the plaintiff and examined by Mr. SWEZEY, testified as follows:

Q. Were you one of the publishers of the Dakota Pantagraph in October and November, 1879?

A. I was; yes, sir.

Q. Do you recognize this dissolution notice which is attached to your affidavit of publication?

A. (Examining paper.) Yes, sir.

Q. Will you state how that notice was delivered to you for publication?

A. The young Mr. Bates came into the office October 21st, as I should judge from the date witnessed here, and stated to me that there had been a dissolution of the firm of C. Bates & Son and that he wanted a notice written for it. He made some remark to me about which one of them retired and which one of them would continue the business, and he designated them by the initials, as I remember. Before that time and since that time I have had difficulty in distinguishing between the young man and the old man by their initials. I asked some of the boys in the office which was the young and old Bates, and among us we determined by the initial whichever one it was that was going to continue the business. By
80 the initial it was the young man that was to continue the business and the old gentleman was to retire; and so, as is frequently the case, people come in and state what they want—a notice of dissolution—presuming that the newspaper man is familiar with the forms, and from this understanding of the case I prepared the notice, and it was so printed. What he said I can't remem-

ber now, but that was the impression I had from what he did say.

Q. That request was delivered orally?

A. Yes, sir.

Q. Who wrote up the notice, in fact?

A. I wrote the notice myself.

Q. Was your attention called to that error some weeks afterwards?

A. Yes, sir; the young Mr. Bates told me some time afterwards that there had been a mistake made in it.

Q. Just what does the mistake consist in?

A. I can't tell now facts arising at the time the order was given for the insertion of the notice; I can't remember.

Q. The fact is the young man mentioned the initials of the firm?

A. Yes, sir; what he said to me as determining which should continue the business and which would withdraw he designated by initials. I don't know whether "C. Bates" was the
81 young or old man or "C. E. Bates" the young or old man. He either said to me that C. Bates would continue the business or C. E. Bates would continue the business; and as it is usual in drawing up notices I was accustomed to say either the Jr. or Sr. member of the firm would continue the business, I interpreted his language to mean as it is written here (indicating). He afterwards told me that I had made a wrong interpretation.

Q. The language was your own and not his?

A. Yes, sir; the language is my interpretation of his language, which interpretation he subsequently informed me is incorrect.

CHRIS. SOLI, called and sworn in behalf of the plaintiff and examined by Mr. SWEZEY, testified as follows:

Q. Your name is Chris. Soli?

A. Yes, sir.

Q. What is your business?

A. Clerking.

Q. For whom?

A. C. K. Howard.

Q. Did you reside in Sioux Falls in the fall of 1879?

A. Yes, sir.

Q. Do you recollect of purchasing some butter about the
82 month of November, 1879, for Mr. Clark Bates, plaintiff in this action, to take to the Black Hills?

A. Yes, sir.

Q. Have you any remembrance *or* about the quantity you procured for him?

A. I have, sir; some hundred pounds.

Q. How and where did you procure it?

A. I bought it of the farmers through the country; it was brought in here and afterwards packed into tubs; got in jars.

Q. Were you familiar with the price of butter at that time?

A. Yes, sir.

Q. What was the butter fairly worth, packed in tubs?

A. I paid from eighteen to twenty cents a pound for it; I paid according to the quality of the butter.

Cross-examination by Mr. WILKES:

Q. Were you at work for Howard at that time?
A. No, sir.
Q. You bought it and sold it to Clark Bates?
A. I bought it for Charlie Bates; he wanted me to buy it and I bought it for him.

Direct examination resumed:

Q. You say you bought it for whom?
A. Charlie Bates—young Bates.
Q. Well, young Bates is Clark Bates; for this young man (indicating plaintiff)?
83 A. Yes, sir; young Bates.
Q. Done business for Mr. Bates of any kind?
A. No, sir; I had nothing to do with him.

THOMAS KENNIS, called and sworn in behalf of the plaintiff and examined by Mr. SWEZEY, testified as follows:

Q. Where do you reside?
A. In Sioux Falls.
Q. Where were you residing in the fall of 1879?
A. Here in town.
Q. What is your business?
A. Butcher by trade.
Q. In whose employ?
A. C. K. Howard's.
Q. Do you recollect Mr. Clark Bates buying quite a large quantity of bacon and pork at your place of business in November, 1879, to carry to the Black Hills?
A. Yes, sir.
Q. State to the jury what part you had in that transaction.
A. I carried it up out of the cellar and weighed it out.
Q. To whom did you deliver it?
A. To young Mr. Bates.
Q. Are you able to state what that bacon and pork was worth at that time?
A. I think he paid about nine cents for it.
84 Q. Have you any recollection of the amount that was purchased by him?
A. Something over one thousand pounds. I don't recollect just how much.
Q. In what condition was the pork at that time?
A. When he took it it was not smoked, just packed in salt; it was good.
Q. Would you distinguish it as fresh pork?
A. It was salt pork; it was ready to smoke at any time.

Plaintiff rests.

Defendant's counsel offered in evidence one paper that was omitted by the counsel on the other side—that is, the affidavit in attachment

in this case of The City Bank of Minneapolis, Minnesota, *vs.* Bates, marked E. R., T. C. B., marked Exhibit "K," T. C. B., and read in evidence as follows: (Here insert it. See Ex. "K," attached to back hereof.)

Def't- counsel offered in evidence paper which was omit-ed, termed the second inventory of property attached, marked Exhibit "M," T. C. B., and read in evidence as follows: (Here insert it. See Ex. "M," attached to back hereof.)

85 Def't's counsel also offered in evidence the stenographer's report—three questions on page twenty—in the case of Charles Bates *vs.* Henry Callender—the stenographer's transcript of the evidence in the case that was tried last term.

Pl'ff's counsel objected.

THERON C. BROWN, called and sworn in behalf of the defendant, testified as follows:

Here follows his identification of his official transcript in the case of Charles Bates *vs.* Henry Callender, tried at the last term of this court.

Def's counsel offered in evidence from said transcript from page twenty the last five questions and answers on the page.

Pl'ff's counsel objected. Objection withdrawn.

HENRY CALLENDER, called and sworn in his own behalf and examined by Mr. WILKES, testified as follows:

Q. Are you defendant in this action?

A. Yes, sir.

Q. Do you remember the appraisement proceed- that have been referred to wherein T. T. Cochran, John Ford, and Willey was the appraisors in November, 1879?

86 A. I remember the circumstances connected with it; yes, sir.

Q. Were you present at the time these appraisement proceedings were had?

A. I was.

Q. Who else was present?

A. Mr. Ford, Cochran, and Willey, Mr. Clark Bates and Mr. Wells, Mr. Charles Bates, and I don't know but others.

Q. Where were these appraisement proceedings had?

A. Principally at the livery stable; a portion of them were at Culburston's barn, and some at the old lumber office of Bates and Son.

Q. Do you remember some matters proceeding the appraisement as to a dispute between the parties as to having an appraisement?

A. Yes, sir; they claimed separate property.

Q. Examine that notice. Do you remember of such a notice being served upon them?

A. Yes, sir (examining paper, Exhibit 2.)

Q. At the time you served these papers of attachment did you take the property and place it in your barn down there?

A. Yes, sir; a portion of it.
Q. Where did you take it from?
A. The wagons were under a shed in the rear of the office Mr. Bates was doing business in, on 10th street.
87 Q. You took a part from there to the barn where it was appraised finally?
A. Yes, sir.
Q. And a portion of the property was in another place?
A. Yes, sir; in Culbertson's barn.
Q. Did you leave it there also?
A. I did.
Q. After this first dispute between the parties relative to *his* appraisement proceeding-, after service of this notice you have just now referred to, did the parties then agree to an appraisement?
A. Yes, sir.
Q. State to the jury your understanding of that appraisement of that proceeding.

Pl'ff'- counsel objected to his understanding Ex. (2).

Q. State what was done with the parties. First, this notice was served; after that notice was served on the 13th day of November; did the defendants in that case, Charles Bates and Clark Bates, accept of that notice and have an appraisement?
A. Yes, sir; I think they selected Mr. Ford; I selected another person, Mr. Cochran, and Ford selected Mr. Willey, as appraisors, and went on and made an appraisement.
Q. At the time they accepted that notice, did they accept that as individuals or as partners?
88 Pl'ff'- counsel objected that it is a mere conclusion of the witness.

THE COURT: The objection is sustained.

Def's counsel duly excepted.

Q. When the first proceedings were had relative to this appraisement, is it not a fact that M. Wells, on behalf of the plaintiff in that action, refused to accede to the individual claim of exemption of their property?

Plaintiff's counsel objected as leading, incompetent, and immaterial.

THE COURT: The objection is sustained.

Def't's counsel duly excepted.

Q. You may just state in your own manner to the jury again what was done—first, in reference to the claims of exemption that were made; state in detail as it occurred.
A. At the time the papers were served?
Q. Yes, sir; right from the time this notice was served.
A. Mr. Bates was claiming a separate exemption and Mr. Wells, the attorney, thought they didn't have that right.

Plaintiff's counsel objected to what Wells thought.

Q. What else?

A. They went on and wanted a separate appraisement—wanted fifteen hundred dollars apiece for exemption. I told them
89 at the time I thought there was not that amount of property, and that it was not worth while to have an appraisement if that was the case. Afterwards, after considerable talk—I don't know all that was said and done—at last an appraisement was made as partnership property that I made returns on. I supposed it was acquiesced in; at least Mr. Bates attended the appraisement and selected their man.

Q. At this appraisement as it occurred at your barn did Mr. Charles Bates have some words of difference with you?

A. Yes, sir; he did, in regard to a yoke of cattle; I don't know about something else I had; in regard to oxen that were in the yard there.

Q. Were those oxen taken under the attachment?

A. Yes, sir.

Q. What did Bates say or do there at that time?

A. Well, he claimed that the cattle belonged to a man out on the Jim river, or out West. He wanted to stop the appraisement—claimed that the appraisors had no right to appraise that property; talked about it lots himself. I remember that one of the appraisors inquired of me what they should do. I told them I wanted the property appraised; to go on and appraise it; there was tough language used there.

Q. Did Bates at that time use some harsh language?

90 A. He did. I don't know that I recollect it. I considered it so at the time.

Q. Got out of temper?

A. I suppose so. Of course I don't know.

Q. This lumber wagon, as appraised at twenty-five dollars, do you remember that wagon?

A. Yes, sir.

Q. You heard testimony in regard to its value by Bates this morning?

A. Yes, sir.

Q. What was the reasonable value of the wagon?

A. I thought it was an old, second-hand wagon, worth, perhaps, thirty dollars.

Q. This set of new harness, what was the reasonable value of that set of harness?

A. The harness was a very plain harness—work harness—no extra straps at least; harness would have sold, perhaps, for thirty dollars.

Q. Now, as to the contents of these two loaded wagons, this meat and butter, did you examine the butter?

A. Yes, sir.

Q. How long was it after you placed this property in your barn before appraisement was had?

A. I don't know how many days; not long.

Q. Was it injured any in the meantime?

A. No, sir; I don't think it was. I took as good care of it as I knew how.

Q. What quality was that butter? Did you examine it yourself?

91 A. Yes, sir.

Q. What quality of butter was it?

A. I didn't know as much about butter then as I do now; I talked with Wells about some perishable articles, and he told it; I don't think the butter was very good butter.

Q. Do you think the values of that property as given by the appraisors a fair value?

A. Yes, sir; I think it was a fair value for it.

Q. Was that butter good quality or poor quality?

A. It was only ordinary quality; poor quality when I sold it, sure.

Q. What kind of weather was it when this property was at your barn, cold or warm weather?

A. I don't know; it was quite cold some days; some days that the wind blew quite cold.

Q. That meat and butter would not have spoiled that day or so you had it there?

A. I would not have supposed it would; we are keeping butter now without ice; I think it would keep.

Q. (Exhibiting paper.) Is that your handwriting marked second inventory?

A. Yes, sir. (Examining paper.)

Def't's counsel offered in evidence Ex. "M," T. C. B., and read as follows: (Here insert it.)

92 Cross-examination by Mr. SWEZEY:

Q. How long was this property in the barn before the sale of the perishable property?

A. It was more than ten days; I don't know what length of time.

Q. Was it opened some time before the sale?

A. Yes, sir; I looked at the butter, of course; I don't know how to examine butter.

Q. Did you test it?

A. Simply by tasting; I went through the meat; I thought it was necessary.

Q. Do you remember throwing it out on the barn floor?

A. Yes, sir; I took it out and resalted it; got a box and placed in it.

Q. Was that sold as perishable?

A. Yes, sir.

Q. Wasn't it as much as fifteen days before it was sold?

A. Yes, sir.

Q. Did you use the barn as a livery stable?

A. Yes, sir; it was in the carriage part of the barn.

Q. Horses kept near it?

A. Yes, sir; in the stable adjoining.

Q. How many horses?

A. We kept ten horses; we had a different number of horses there.

Q. Were the doors kept open between the horse stable and the carriage part?

93 A. It was the intention to have them closed; were opened as we took horses in and out.

Q. Did Mr. Clark Bates do anything in regard to the appraisement except to speak to Mr. Forde?

A. I don't know as he did anything except — his presence; he didn't make any refusal in regard to the appraisement.

Q. Did he do anything else that indicated his intentions, except select Mr. Forde as one of the appraisors, at your request?

A. He went down with us.

Q. He didn't interfere with it?

A. No, sir.

Q. He made no claim to the oxen, did he?

A. No, sir.

Q. He claimed the other property you took from him as his individual property—made a separate demand for it?

A. He did, before this appraisement.

Q. Did you, at the time you made this appraisement, know of any other property belonging to the young man, plaintiff in this action?

A. No, sir; I didn't know of any property; I thought they had property that belonged, as I supposed, to the company.

Q. Did you know that they had had a settlement some weeks before?

A. No; I didn't know it.

94 Q. Did you see a notice in the paper?

A. Yes, sir; and that is what bothered me; it showed one was doing business, and they claimed different.

Q. When you went to the office and Bates pointed out this property you inquired for Clark Bates?

A. I inquired for property that was reported to me as going to the Black Hills; I would not be positive; I inquired for property that I supposed was moving.

Q. How long after you levied upon the property at the office before you levied on the property of Charles Bates?

A. I would not say positively; it was soon after.

Direct examination resumed by Mr. WILKES:

Q. At the time of this appraisement proceeding do you remember whether a demand was made upon these parties to turn out other property which they had?

A. Yes, sir.

Q. It was claimed that they had other property which they had not produced?

A. Yes, sir.

Q. They refused to turn out any other property?

A. They said if there was anything more we could find it; both of them said that.

Q. Was this meat that has been referred to injured any by you in placing out of those wagons on the floor there for the purpose
95 of salting it?

A. It did become injured; I don't remember. I think Mr. Perry claimed one of the wagons that the meat was in. I think the meat was either in the box or else in the wagon. The appraisors turned it out on the carriage floor for the purpose of finding out how much there was. In a few days afterwards I saw the meat was not in proper condition. I got some boxes and placed it in there and put a little salt on it. I covered it over. That is all I did to the meat.

CHAS. HUMMEL, called and sworn in behalf of the defendant and examined by Mr. WELLS, testified as follows:

Q. Where do you reside?

A. Mitchell, Dakota.

Q. Were you ever in the employ of Charles Bates and Clark Bates?

A. Yes, sir; I was.

Q. When was it; what year or years?

A. I don't recollect. I think 1879—1878 or 1879.

Q. At Sioux Falls?

A. Yes, sir; Sioux Falls and Rockport, Dakota.

Q. Were you conversant with their business somewhat when you were with them?

96 A. Knew something of their business, but not very much; I knew about as much of their business here as they did or thought they did.

Q. You were salesman, were you?

A. Yes, sir.

Q. Where did you board at the time you worked for them?

A. With Mr. Bates; with both the old gentleman and Clark E. Bates; also with their families.

Q. Did they do a large business?

A. I considered it so.

Q. Selling a good deal of lumber and material?

A. O, yes, sir.

Q. Did you ever hear any conversation of those two men in reference to their business?

A. Yes, sir; a number of times.

Q. Did you ever hear any conversation in reference to a failure?

A. I did.

Pl'ff's counsel objected as incompetent, irrelevant, and immaterial.

The COURT: The objection is overruled.

Pl'ff's counsel duly excepted.

Q. Go on; state what you heard and when you heard them?

A. I never heard them say anything in regard to doing this kind

of business, only when we were going up to and from meals; we usually went up together to dinner. I heard them say that
97 before the bankrupt law was out of existence, or about that time, if they would have large sales and get all the money they could they would not pay their creditors. I don't recollect of their saying about what time they would fail, but have heard them say if they had a yard *of* Rockport, Dakota, the men they had dealings with would not be so apt to find their property; they said it time and time again.

Plaintiff's counsel to the word "they" objected.

WITNESS: Both of them, several times; it was common talk amongst them.

Q. Was it talked over in the home when you were there?

A. No, sir; I never heard them say anything at the table.

Q. Did they ever ask your opinion—what you thought of such a transaction?

A. They did.

Q. Whether it would be all right to make money that way?

A. I told them I didn't know; they could do what they was a mind to about it.

Q. This was a frequent occurrence, this talk?

A. Yes, sir.

98 Q. About the time these talks occurred did they start some yards out on the Jim, Dakota?

A. Yes, sir.

Q. Where at?

A. Rockport, Dakota; afterwards at Firesteel.

Q. Did they take over much material there?

A. Yes, sir; a good many loads.

Q. Did this firm of Bates and Son carry a large stock of lumber while they were here in Sioux Falls?

A. Yes, sir; they bought at one time, I think they told me, five hundred thousand feet; they had it coming right along.

Q. They had a large yard?

A. Yes, sir; a good sized yard.

Q. At what time in the year did you go out to Rockport?

A. The same year, 1879, about December.

Q. December, 1879?

A. Yes, sir; I think it was.

Cross-examination by Mr. SWEZEY:

Q. When did you quit the employ of Bates and Son?

A. In the year 1880, I think.

Q. Don't you know they dissolved in 1879?

A. I don't know whether it was 1878 or 1879 when I went out to Rockport.

99 Q. Don't you know they closed up the business at Rockport before closing at Sioux Falls?

A. I don't know.

Q. Were you with them at the time they closed up business at Rockport?
A. Yes, sir.
Q. Was that the time they changed to Firesteel?
A. Yes, sir.
Q. Don't you know that both of those yards were closed out before they closed here?
A. No, sir.
Q. When did you commence work for them?
A. I commenced in 1878.
Q. Did you have any difficulty at the time you was discharged from their employ?
A. I never was discharged; I quit them at Rockport.
Q. Did you have any little unpleasantness with them at that time?
A. No, sir.
Q. Have any difficult- about your accounts with them?
A. No, sir.
Q. What was the occasion of your leaving?
A. I thought I had a better stake. I thought I could make more money than working for them. I went into the hotel business at Rockport.
Q. Are you satisfied you worked for them any after October, 1879?
A. I think not.
Q. Then you are mistaken about its being in December, 1879?
100 A. That was 1878.
Q. In 1878 you boarded with Bates and worked for them?
A. Yes, sir.
Q. These conversations you speak of between them were in your presence as you rode home?
A. Yes, sir.
Q. In the presence of both these men, both said it?
A. Yes, sir.
Q. Do you know when the bankrupt law was repealed?
A. I don't know; think it was 1878.
Q. Was it before the bankrupt law was repealed?
A. I don't know.
Q. Was it talked they were going through bankruptcy?
A. No; I heard them say that the bankrupt law was done away with now, and they could not beat their creditors that way.
Q. Were they joking about it?
A. I don't know whether they were joking about it or in earnest.
Q. Now, what time of the year 1878 was it you heard such talk?
A. During the summer, all the while, it was common talk.
Q. What months; didn't they talk about anything else?
A. O, yes.
Q. They talked about that all — time?
A. Yes, sir; a good deal of the time.
101 Q. At whose request did you come here as a witness?
A. At Mr. Wells'.
Q. Where did you come from?

A. Mitchell, Dakota.
Q. When did you come?
A. Came here yesterday morning.
Q. You was here as a witness upon the trial last term in the other case?
A. Yes, sir.
Q. When did you go in the employ of these men?
A. April, 1878.
Q. You are sure of that, are you?
A. Yes, sir.
Q. In your examination in the other case last spring didn't you locate these conversations in 1878, probably the first of April?
A. Yes, sir; one time.
Q. You say they commenced talking that to you when you first entered their employ?
A. Not at the first start.
Q. Didn't you testify this conversation about bankruptcy was in April, 1878?
A. It may have been.
Q. Now you testify you went into their employ in April; were you their confidential hand?
A. I was.
Q. Do you know the bankrupt law was in force in April, 1878?
A. Probably was.
102 Q. You say they talked about their not having the benefit of it?
A. Not then; they talked about making money by beating their creditors.
Q. Didn't you, last spring, testify you did have trouble with them when you left their employ?
A. I don't know as I call it trouble; it troubled me, of course.
Q. Didn't you swear last spring that you did have trouble with them when you left their employ; don't you remember swearing to that?
A. No, sir.
Q. What month did you leave their employ?
A. I think it was August, 1879.
Q. You commenced work for them in April, 1878?
A. Yes, sir.
Q. Did you work continuously all that time?
A. I did; part of the time at Sioux Falls and part of the time out West.

Direct examination resumed:

Q. What is your business now?
A. Foreman of the Oshkosh lumber business at Mitchell.
Q. You are in charge of the yard, are you?
A. Yes, sir.
Q. Who is the general manager of that company in the Territory?
A. H. W. Ross, here in Sioux Falls.

103 Q. You have been in their employ how long?
A. About two years.
Q. Had you and Bates & Son any partnership in a small store at the same time you were in charge of the lumber yard?
A. Yes, sir.
Q. Were you selling goods?
A. Yes, sir.
Q. Did either of the Bates ever come out there and demand a settlement with you out there?
A. No, sir.
Q. At the time they removed their yard were they owing you?
A. Yes, sir.
Q. Have they ever paid you?
A. We had a settlement here at Sioux Falls, but I didn't consider it what was due me.

W. E. WILLEY, called and sworn in behalf of the defendant, testified as follows:

Q. Are you acquainted with Henry Callender, defendant in this case?
A. Yes, sir.
Q. With Clark Bates and Chas. Bates? Examine that paper; see if that is your signature there.
A. Yes, sir; it is (examining paper).
Q. Do you remember the proceedings connected with an appraisement in the case of The City Bank of Minneapolis *vs.* Bates?
104 A. Yes, sir.
Q. Do you remember who were the appraisors?
A. T. T. Cochran, Forde, and myself.
Q. You remember making an appraisement of that property, do you?
A. Yes, sir.
Q. That is the list of property and values as you made them at that time (indicating paper)?
A. Yes, sir; I remember that.
Q. Do you remember the meat and butter that was in those wagons?
A. Yes, sir.
Q. Did the appraisors take out those articles and weigh them?
A. Yes, sir.
Q. Was the value you appraised them at here as listed in this list; was that the reasonable market value of those goods in this place at that time?
A. Well, I think it might have been, perhaps, a little low.
Q. That was your judgment then?
A. It had been laying there quite awhile; that is what we appraised it at; the meat especially, I think, was a little low.
Q. What, if anything, else was low?
A. Nothing that I remember of; all the rest, I think, was appraised at fair value; the meat, I think, *it* was appraised one
105 cent a pound lower than it ought to have been; that was my judgment then, but the others thought it was enough.

Q. You had no interest in it individually?
A. O, no.
Q. This lumber wagon that was appraised at twenty-five dollars?
A. I thought it was all it was worth.
Q. That harness—twenty-five dollars?
A. I thought that was all that was worth.
Q. You went through all these articles—the meat, butter, beans, onions?
A. We went through them all—weighed them all.
Q. And that was a fair estimate, with perhaps the exception of the meat?
A. Yes, sir.
Q. How much difference would it have made with the value of the meat?
A. I think, if I remember right, there was something less than one thousand pounds of the meat.
Q. You think it was appraised perhaps one cent less than it was actually worth?
A. It was sold at auction there in the barn afterwards. I don't remember what it brought.
Q. Were both these gentlemen present?
A. Yes, sir.
Q. The two Bates?
A. Yes, sir.
Q. Mr. Callender there also?
106 A. Yes, sir.
Q. All taking part and having an interest at the time it occurred there?
A. Yes, sir.

Cross-examination:

Q. What part did Clark Bates, the young man, have in these proceedings?
A. I could not say; he was there.
Q. What did he do in the matter of that appraisement; anything more than he was present?
A. He was present and talked about it; I can't say what; the old gentleman also.
Q. Do you remember how much butter there was in this outfit?
A. I don't remember; quite a lot of butter in tubs—put in tubs.
Q. Do you remember how much flour there was?
A. Well, there was—I can't tell—quite a lot of flour in sacks—quite a number of sacks.
Q. Do you remember what rate you allowed him?
A. We allowed him what we thought it was worth.
Q. Can you remember what you allowed?
A. I can't.
Q. Can you remember what you allowed for the onions and beans and the turkeys?
A. I think the onions—it seems to me that the onions—well, I would not say.

Q. Have you any distinct remembrance of what you allowed for any one article?

107 A. I can't tell at this time; we looked the stuff all over.

Q. Do you know what you allowed for the tents and fixtures?

A. We looked it all over; we calculated we allowed what it was worth.

Q. Didn't you allow what it would bring at sheriff's sale?

A. What it would bring at cash.

Q. Did you understand at that time you was appraising it at what it would bring at sheriff's sale?

A. What it would bring in money at private sale; you understand things then was rather low and money was tight here.

Q. You didn't know at that time that it was your duty to appraise at sheriff's prices?

A. I knew it was our duty to appraise at what it would bring at cash.

Q. Don't you know there is a difference at sheriff's sale and in open market?

A. Yes, sir.

Q. Did you have a little trouble with Bates about a mechanic's lien?

A. Yes, sir; there was no trouble. He filed a lien on my house for what money I owed him.

Q. Your relations were unfriendly?

A. No, sir; I knew he ought to have his pay for what I owed him.

—. Didn't you get a little hot?

108 A. No, sir.

Direct examination resumed:

Q. At the time the appraisement was made didn't the appraisors go through and count the sacks of flour, taking care to credit the amounts?

A. Yes, sir.

Q. Went to the coal-sheds and looked over everything—horses, sheds, scales, and everything else?

A. Yes, sir; we was at it half the day and half the night.

Q. You appraised it all in one day, didn't you?

A. Yes, sir; one day and evening; yes, sir.

Cross-examination resumed:

Q. You commenced it one day and finish- it?

A. Yes, sir.

Q. Do you remember appraising some turkeys?

A. Yes, sir.

Q. Do you know how many?

A. No, sir; there was a few.

Q. Was forty-two a few?

A. I don't think there was 42 there when I saw them; I know there was not.

Defendant rests.

CLARK E. BATES, recalled in his own behalf, testifies as follows:

Q. Do you recognize this young man, Hummel, who was on the stand?

109 A. Yes, sir.

Q. Was he in your employ or your firm in 1878 and 1879?

A. Yes, sir; he commenced, I think, in the spring of 1878.

Q. Was your father home at that time?

A. He stayed at Luverne most of the time, loading the lumber on the teams to come over here.

Q. How much of the time was he gone that spring?

A. He was gone almost the whole time; — stay there through the week, come home Sunday, and go back Monday.

Q. You have heard his testimony about a conversation between you and your father, riding up home to meals; did any such conversation occur?

A. No, sir; we never rode up to meals, for we had only one team, and father had them over to Luverne.

Q. Did any such thing occur during the summer?

A. No, sir.

Q. Or at any time?

A. No, sir.

Q. Any talk between you and your father about any such claims?

A. No, sir.

Q. Anything about s-hemes for beating creditors?

A. No, sir.

Q. Did you ever hear Hummel make any such claim until last spring?

110 A. No, sir.

Q. Up to the time he left your employ you never heard him make any such claim?

A. No, sir.

Q. Was there any difficulty between your firm and Hummel?

A. We could not settle with him when I discharged him.

Q. When was the business closed out?

A. Month of June or July, 1879—either June or July.

Q. What became of the business at Rockport?

A. Moved to Firesteel.

Q. Why did you move it?

A. We thought we could sell it better there.

Q. Was there then a prospect of a railroad there?

A. Yes, sir.

Q. What time was that business closed out at Firesteel?

A. Well, I think we didn't continue business there not quite two months.

Q. How much of a business did you do there at Rockport and Firesteel?

A. Our business -as mostly grain. The fall before we had a good many accounts; we collected in accounts in barley and oats; other grain was high, and we commenced that store over there; drawed over five or six loads of lumber a week.

111 Q. How long before your settlement with the creditors that you closed out that business?

A. Probably a month or two.

Q. Was there any property left over there belonging to the firm at the time of the attachment?

A. No, sir.

Q. What was there of that little store there?

A. We told him that, if he had, he had something like one hundred dollars; he put that in provisions; we put in about the same; he was to have half of the profits on the things in the store.

Q. Where was the store?

A. Store and office together; we built a building principally to hold grain in; we had it filled with oats and barley; he had in the front the store and office; he had some shelves on one side of it.

Q. State how you came to discharge Hummel—what occurred?

A. He could not give account of the lumber that we had sent over there—of the sales.

Q. Who settled it with him?

A. I went over to settle it with him.

Q. In what condition was he when you found him there?

A. He had been on a spree; Mr. Cole had wrote me a letter telling me to come over, that Hummel was sick abed; that he
112 was not able to attend to business; wanted me to come over as soon as I could get there.

Q. Did you then close out the business?

A. Yes, sir; shortly after—few weeks after.

Q. He was no longer in your employ?

A. No, sir.

Cross-examination:

Q. When did you go over to Rockport to make this settlement you talk about?

A. When I closed the business there.

Q. When did you go over to make the settlement?

A. The latter part of June or the first of July.

Q. Did you testify in the examination in the case of Charles Bates *vs.* Henry Callender it was the latter part of July?

A. I went over there probably every two weeks—perhaps it was.

Q. When did you go over there to make this settlement?

A. I think probably in the month of July, as near as I can remember.

Q. At the time you went to make settlement, is not it a fact the lumber yard was closed out entirely?

A. No, sir.

Q. Wasn't it at Firesteel at the time of the settlement?

A. No, sir; we tried twice to settle with him.

Q. When?

113 A. Once, after I moved the lumber away.

Q. Did you try to settle before you moved the lumber away?

A. We went over there, and he could not give any account, and we took and moved the lumber away.

Q. Did you examine the books?

A. Yes, sir; what books he kept.

Q. Do you know how much you sent over there?

A. I could tell at the time; I could not tell you now; I had an account how much we sent over.

Q. You say you once had a talk about settlement after the removal of the yard from Rockport?

A. Yes, sir.

Q. Were you there when the yard was removed from Rockport to Firesteel?

A. My father moved the lumber to Firesteel, or helped do it.

Q. When was that?

A. Some time in July; I think it was some time in July.

Q. After you got through over there, did you go up to Firesteel to see what lumber there was there at Firesteel?

A. At what time?

Q. At the time of this settlement.

A. I went to Firesteel; I don't know what time you speak of.

114 Q. At the time of this settlement, did you go to Firesteel to see what lumber had been moved from Rockport to Firesteel?

A. At the time of the settlement there was no lumber moved to Firesteel.

Q. Do you say you made a settlement one time after it was removed?

A. We tried to; yes, sir.

Q. At that time had you been to Firesteel to ascertain what lumber there was?

A. At what time I could not tell you.

Q. Do you know how much lumber there was at Firesteel at the time of the settlement that had been taken from Rockport?

A. No, sir.

Q. Then you didn't know anything about what lumber had been taken to Firesteel, except Hummell's statement?

A. He didn't account for it at all; I claimed there was some missing.

Q. How do you know there was some missing?

A. Because we had sent the lumber over there.

Q. Were you there when the lumber was taken to Firesteel?

A. No, sir.

Q. You state you had not been to Firesteel to see what lumber was there?

A. No, sir.

115 Q. Now, how do you know that all the lumber that Hummell had at Rockport was not sent to Firesteel?

A. Because the books didn't show what became of the lumber.

Q. Would the books show where it was sent?

A. It ought to.

Q. Then I suppose if he had wrote down what was sent to Firesteel you would take that rather than go to Firesteel?

A. Yes; that would be the best.

Q. Then you had enough confidence in the man to take his statement?

A. The books didn't show nothing.

Q. You didn't go to Firesteel to see whether he had sent it up there, you say?

A. Father took what lumber there was there, but he had kept no account of it.

Q. I am asking you what you know about it; you say you was out there before the lumber yard was sent away from Rockport?

A. Yes, sir.

Q. Did you take any invoice of the stock of lumber and goods that were there at that time.

A. I did the last time that I was there.

Q. What time do you mean, now; what time did you take the invoice?

116 A. May have been three or four weeks before we moved the lumber away.

Q. Who was there with you?

A. Mr. Hummell.

Q. Did you and he go through the yard and measure up the lumber?

A. Yes, sir; seen how much it was.

Q. Then what did you do?

A. Seen how it compared with what was sent there.

Q. What else?

A. That is all.

Q. That is before the settlement?

A. That was the time we tried to settle. The latter part of July I went over there; he claimed we owed him some money and I paid it to him.

Q. You say you made an inventory of that lumber?

A. Yes, sir.

Q. Did you, when you made settlement, take an inventory of the lumber on hand—yes or no?

A. I took an inventory three or four weeks before the last settlement.

Q. Did you, when you made settlement, take an inventory of the lumber on hand—yes or no?

A. Yes, sir; three or four weeks before we moved the lumber up there.

Q. Did you testify at the last term of court, in answer to this question, "Did you, when you made settlement, take an inventory of the stock of lumber on hand?"—did you answer, "Charles had an inventory; no, sir?"

117 A. I could not tell you.

Q. Did you testify at the last term of court, in answer to the question, "Did you make an inventory?"—did you answer at the time, "No, sir?"

A. I don't remember now.
Q. Which is correct; did you make an inventory or not?
A. I did, three or four weeks before the lumber was moved.
Q. How did you look it over to find it out?
A. I would not be sure which did measure; there was half a dozen loads of lumber.
Q. Then you did make an inventory?
A. Yes, sir; at that time.
Q. What time?
A. Three or four weeks before the lumber was removed.
Q. Was it at the time you had settlement with him?
A. At the time we attempted to settle; we didn't settle at that time.
Q. Did you take his statement of the amount sold, he had made, of lumber?
A. Yes, sir.
Q. Had this lumber been shipped to Firesteel before the settlement?
A. Not before settlement; I was speaking of the inventory.
Q. Was Mr. Hummel there the last time you went to Firesteel?
A. I think he was.
118 Q. In charge of the yard?
A. The last time? The last time I was there there was no yard there.
Q. Well, the last time you went out to see Hummel the yard had been moved?
A. Yes, sir; I was going to Firesteel and I stopped to see him.

CHAS. BATES, recalled, testified as follows:

Q. Did you hear Mr. Hummell's testimony in regard to some conversations between you and Clark Bates in regard to your debts and creditors—your affairs?
A. Yes, sir.
Q. State to the jury whether there was anything of that kind occurred.
A. In the first place, I never went up to the house with him while he worked here; I went over always on Monday morning, either to Beaver creek or Luverne, with stage or my own team; I never went up to the house with him, either with the team or on foot, whilst he was here.
Q. Was there ever any such talk?
A. No, sir; never.
Q. Anything from which he could manufacture such a statement?
A. No, sir; only out of a lie or some foolish statements; it looks foolish, anybody can see, such a fellow as that; I would not
119 tell him such a thing as that; he must take me as a fool.

Plaintiff rests.

Def't's counsel offered in evidence stenographer's minutes in case of Chas. E. Bates *vs.* Henry Callender, in Clark Bates' testimony, no objection being offered by plaintiff's counsel.

120 EXHIBIT 1.

TERRITORY OF DAKOTA, } ss:
Minnehaha County, }

In the District Court of the Fourth Judicial District.

CITY BANK OF MINNEAPOLIS

vs.

CHARLES BATES and CLARK E. BATES.

To said plaintiff or his att'y, Henry Callender, sheriff of said county:

You are hereby notified that I claim, as exempt under the laws of said Territory, the following personal property levied upon and taken into custody by said sheriff by virtue of the warrant of attachment in this case, to wit: 4 sacks of onions, 10 or more bushels of beans, 1,135 lbs. of pork, 800 lbs. of flour, 3 bushels of pop-corn 490 lbs. of butter in firkins, 20 or more bushels of oats, one large tent & fixtures, one stove & apparatus, new double set of harness, one wagon with appurtenences, lot of provisions, blankets, wagon sheets, revolvers, and all other articles of property taken with the above and now in your possession at the livery stable of Henry Callender in Sioux Falls; also 42 turkeys seized by said sheriff, and
loat of oats in office, and that I demand the return of said
121 property to me forthwith, and that I am ready to proceed in an appraisement of the same as provided by law, and have selected one W. T. Perry as one of the appraisers in the matter.

November 11th, 1879.

CLARK E. BATES,
By PETTEGREW & SWEZEY,
His Att'ys.

EXHIBIT (2.)

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, 4th Judicial District, within and for said County.

CITY BANK OF MINNEAPOLIS, Pl'ff,

vs.

CHARLES BATES and CLARK E. BATES, Doing Business as C. Bates and Son, Def's.

The plaintiff in the above-entitled action hereby gives to the aforesaid defendants notice that said plaintiff is ready and will proceed to take an appraisement of all the property attached under and by virtue of a warrant of attachment in said cause issued, and you are hereby notified to select an appraiser to appraise the said property so attached.

R. J. WELLS,
Att'y for Pl'ff.

122 Ex. 2. T. G. B.

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, 4th Judicial District, within and for Minnehaha County.

CITY BANK OF MINNEAPOLIS, MINNESOTA, Pl'ff,
vs.
CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates and Son, Def'ts.

We, T. T. Cochran, John Forde, and W. E. Willey, disinterested citizens of the county of Minnehaha, D. T., being selected as appraisers, John Forde being selected by the defendants above named and T. T. Cochran by the plaintiff above named and W. E. Willey by T. T. Cochran & John Forde, being first duly sworn, says, each for himself, that he will truly and honestly and impartially appraise the property of said debtors, the defendants above named.

T. T. COCHRAN.
JOHN FORDE.
W. E. WILLEY.

Subscribed and sworn to before me this 13th day of November, A. D. 1879.

HENRY CALLENDER,
Sheriff Minnehaha Co., D. T.

123 EXHIBIT 2. T. G. B.

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, 4th Judicial District, within and for Minnehaha County.

CITY BANK MINNEAPOLIS, Pl'ff,
vs.
CHARLES BATES and CLARK E. BATES, Doing Business as C. Bates and Son.

I, Henry Callender, sheriff of the county of Minnehaha, D. T., and T. T. Cochran and John Forde and W. E. Willey, disinterested freeholders of the said county, hereby certify that the following is a true inventory of all the property seized by me, the said sheriff, on a warrant of attachment issued in the above-entitled action out of the district court of the 4th judicial district, which comprises and includes the county of Minnehaha, together with a statement of the personal property taken into custody of said sheriff on said warrant, and the value of each article of personal property, and also a true statement of such articles thereof as are perishable, as the same has been appraised by me.

HENRY CALLENDER, *Sheriff.*
T. T. COCHRAN.
JOHN FORDE.

124 (1st page.)

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

In District Court, 4th Judicial District, within and for Minnehaha County.

CITY BANK OF MINNEAPOLIS
vs.
CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son.

Inventory of property attached in the above entitled action.

One old lumber wagon	$25 00
One yoke of oxen & yoke	80 00
One set of new harness	25 00
Contents of two loaded wagons	236 00
	$366 00

(2nd page.)

One lumber office & sheds attached	75 00
1 hay-scales	75 00
1 coal-shed & coal therein, situated on 10th St., Sioux Falls, D. T.	119 00
8 barrels & contents, coal	12 60
1 office book of accounts	
1 span sorrel mares, with old harness and wagon	160 00
1 dwelling-house, known as Wm. Mason's house	75 00

I, Henry Callender, sheriff of Minnehaha county, D. T., certify that the above inventory is a true copy of the original.

HENRY CALLENDER.

EXHIBIT 3.

125 TERRITORY OF DAKOTA, } ss:
Minnehaha County, }

I, E. W. Caldwell, of Minnehaha county, Territory of Dakota, being duly sworn, depose and say that I am a publisher of the Dakota Pantagraph, a weekly newspaper published in said county and Territory, and in general circulation in Minnehaha county, Dakota Territory, and that the annexed notice of dissolution was published in said paper in the issues of October 22d and 29th and November 5, 1879.

E. W. CALDWELL.

Subscribed and sworn to before me this 12th day of November, 1879.

[SEAL] JACOB SCHAETZEL, JR.,
Notary Public, D. T.

Dissolution Notice.

The firm of C. Bates & Son, dealers in lumber and fuel, is this day dissolved by mutual consent, the senior of the firm retiring. The fuel business will be continued by the junior member, who will receipt for all accounts due the late firm, and debtors are earnestly requested to make immediate settlement.

Sioux Falls, D. T., October 21, 1879.

C. BATES & SON.

Notice.

126 EXHIBIT "C," Being the First Leaf of Book of Accounts Introduced in Evidence.

"October 22, 1879. Cash		$500 00
Capital:		
Cash	$500 00	
Sheds & office	100 00	
Scales	100 00	
		700 00
3 tons M. B. coal, @ 10		30 00
10¾ tons egg coal, 1st 8½ range 7¾ nut } 27, @ 10		270 00
		1,000 00

127 TERRITORY OF DAKOTA, } ss:
Minnehaha County, }

In the District Court within and for said Minnehaha County, 4th Judicial District.

CITY BANK, MINNEAPOLIS, MINNESOTA,
vs.
CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son, Def'ts.

The Territory of Dakota sends greeting to Charles Bates & Clark E. Bates, doing business as C. Bates & Son, the aforenamed defendants:

You are hereby summoned and required to answer the complaint of the above-named plaintiff, a copy of which is herewith served upon you, and to serve a copy of your answer upon the subscriber, at his office, in the village of Sioux Falls, D. T., within thirty days after the service of this summons on you, exclusive of the day of such service, and if you fail to answer this complaint within that time the plaintiff will take judgment against you for the sum of eight thousand three hundred and fifty-four, $8,354.20, dollars and twenty cents, with interest thereon from June 3, 1879, on $931, and from July 21st, 1879, — $3,209.20, and from August 21, 1879, on $1,600, & from Sept. 6th, 1879, — $2,614.65, besides the costs of this action.

128 Dated at Sioux Falls, D. T., this 10th day of November, A. D. 1879.

R. J. WELLS,
Plaintiff'- Att'y.

I hereby certify that the within summons and complaint came to my hand Nov. 10, 1879, and was by me personally served on the within-named defendants, Charles Bates & Clark E. Bates, on the 11th day of Nov., 1879, by delivering to and leaving with each of them separate & true copies of the within.

Done within Minnehaha county, D. T.

HENRY CALLENDER,
Sheriff Minnehaha County, D. T.

Fees:

Service	60
Add. def'ts	50
Copy	50
Mileage	20
	1 80

129 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

In District Court, 4th Judicial District, within and for Minnehaha.

CITY BANK OF MINNEAPOLIS *County*, MINNESOTA, Pl'ff,

vs.

CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son, Def's.

The plaintiff in the above-entitled action complain- and alleges—

I. That it is now, & for some years prior to the date hereof has been, a corporation duly organized and existing under the laws of the State of Minnesota for the purpose of transacting a general banking business, and is doing business as such in its said corporate name.

II. That on the third day of June, A. D. 1879, at Minneapolis, Minnesota, said defendants made their promissory note in writing, whereby they promised to pay to the order of C. S. Philbrick and Company nine hundred thirty-one and $\frac{00}{100}$ dollars; which note is in words and figures as follows, to wit:

Ex. 4.

130 $931.00. MINNEAPOLIS, MINN., *June* 3, 1879.

Three months after date we promise to pay to the order of C. S. Philbrick & Co. nine hundred thirty-one & $\frac{00}{000}$ dollars, at the City Bank, Minneapolis, value received, with interest at twelve per cent. per annum.

No. —. Due —. C. BATES & SON.

II. That the said C. S. Philbrick and Company endorsed the same to the plaintiff for value before maturity.

III. That the defendants have not paid the same.

Second. For a second cause of action plaintiff alleges—

I. That on the 21st day of July, A. D. 1879, at Sioux Falls, D. T., said defendants, by their promissory note in writing made, promised to pay to the order of Merriman, Barrow and Company three thousand two hundred nine & $\frac{20}{100}$ dollars ($3,209.20); which note is in words and figures as follows:

$3,209.20. SIOUX FALLS, D. T., *July* 21, 1879.

Three months after date we promise to pay to the order of Merriman, Barrows & Co. thirty-two hundred *two hundred* nine & $\frac{20}{100}$ dollars, at the City Bank, Minneapolis, Minn., value received, with interest at the rate of 12 per cent. per annum until paid.

No. 9456. Due Oct. 24.

C. BATES & SON.

131 II. That the said Merriman, Barrows & Company endorsed the same to the plaintiff before maturity and for value.

III. That the defendants have not paid the same.

Third. For a third cause of action plaintiff alleges—

I. That on the twenty-first day of August, A. D. 1879, at Sioux Falls, D. T., the defendants, by their promissory note in writing made, promised to pay to the order of Merryman, Barrows and Company sixteen hundred dollars; which said note is in words and figures as follows, to wit:

$1,600.00. SIOUX FALLS, D. T., *August* 21, 1879.

2 months after date we promise to pay to the order of Merriman, Barrows & Co. sixteen hundred $\frac{00}{100}$ dollars, at Minneapolis, value received, with interest at the rate of 12 per cent.

No. 9532. Due 21–24 Oct.

C. BATES & SON.

II. That the said Merriman, Barrows and Company indorsed the same to the plaintiff before maturity and for value.

III. That the defendants have not paid the same.

132 Fourth. For a fourth and further cause of action against said defendant, plaintiff alleges—

I. That on the sixth day of September, A. D. 1879, at Sioux Falls, D. T., the defendant, by their promissory note in writing made, promised to pay to the order of Merriman, Barrows and Company twenty-six hundred fourteen $\frac{65}{100}$ dollars; which said note is in words and figures, as follows, to wit:

$2,614.65. SIOUX FALLS, D. T., *Sept.* 6, 1879.

2 months after date we promise to pay to the order of Merriman, Barrows & Co. two thousand six hundred & fourteen $\frac{65}{100}$ dollars, at Minneapolis, value received, with interest at the rate of 12 per cent.

No. 9600. Due Nov. 6–9.

C. BATES

II. That the said Merriman, Barrows and Company indorsed the same to the plaintiff for value and before maturity.

III. That the defendants have not paid the same nor any part thereof.

Wherefore the plaintiff demand- judgment against said defendants for the same—eight thousand three hundred fifty-four and $\frac{20}{100}$ dollars—together with interest on $931.08 thereof from the 3d day of June, 1879, and interest on $3,209.08 thereof from the 2
133 day of July, A. D. 1879, and interest on $1,600 thereof from the 21st day of August, A. D. 1879, and interest on $2,614.65 thereof from the sixth day of September, A. D. 1879, besides the costs of this action.

R. J. WELLS,
Pl'ff's Att'y.

134 *Warrant of Attachment.*

TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

In the District Court in and for Minnehaha County.

CITY BANK, MINNEAPOLIS, MINNESOTA,
vs.
CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son.

The Territory of Dakota to the sheriff of the county of Minnehaha, Greeting:

Whereas an application has been made to me for a warrant of attachment against the property of Charles Bates and Clark E. Bates, defendants, in an action in district court for said Minnehaha county, wherein The City Bank, Minneapolis, Minnesota, is plaintiff, and Charles Bates and Clark E. Bates are defendants;

And whereas the affidavit of Ruthven P. Thompson, the agent of said plaintiff, which has been presented to me on such application, states that a cause of action upon contract for the recovery of money exists against said defendants in favor of said plaintiff, and that the sum of eight thousand three hundred fifty-four & $\frac{20}{100}$ dollars is due from the said defendants to the said plaintiff upon four several promissory notes, made & executed by the said defendants, which constitutes the plaintiff's demand against the defendants in
135 said action, and that the said defendants have assigned, disposed of, and secreted their property with intent to defraud their creditors, and are about to remove their property from the Territory with intent to defraud their creditors, and that plaintiff is entitled to said attachment, according to the provisions of article 4, chapter II, of the Code of Civil Procedure, and it having given the undertaking required by the provisions of the aforesaid chapter and article of said Code of Civil Procedure:

Now, you are hereby commanded and required to attach and safely keep all the property of said defendants —— ——, within your [illegible] exempt from execution, or so much thereof as may be

sufficient to satisfy the plaintiff's demand, above stated, together with costs and expenses, as security for the satisfaction of such judgment as said plaintiff may recover in said action, unless the defendants give you security, by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said plaintiff's demand, besides costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and when this warrant shall be fully
136 executed or discharged you are required to return the same, with your proceedings thereon, to this court.

Witness the Hon. J. S. Kidder, judge of the district court in and for said Minnehaha county, and the seal of said court, this 10th of November, 1879.

[SEAL.] CYRUS WALLS,
Clerk of Court.

Ex. 4.

The within warrant of attachment came to my hands Nov. 10th, 1879, and was by me served as follows, to wit:

On the 11th day of the same month attached—

One old lumber wagon.
" yoke of oxen & yoke.
" set new *horses.*
Contents of 2 loaded wagons.
One lumber office and shed attached.
One hay-scale; one coal-shed & coal therein, situate on 10th St., Sioux Falls, D. T.
8 barrels & contents; 1 office book of accounts.

And on this 12 day of Nov., 1879, the following goods were by me attached, to wit, one span sorrel mares, old wagon, harness, one dwelling-house, as W. Mason's.

HENRY CALLENDER,
Sheriff Minnehaha Co., D. T.

137 Ex. K. T. G. B.

TERRITORY OF DAKOTA, *Fourth Judicial District,* } ss:

In the District Court in and for Minnehaha County.

CITY BANK, MINNEAPOLIS, MINNESOTA, Pl'ff,
vs.
CHARLES BATES & CLARK E. BATES, Doing Business as C. Bates & Son.

TERRITORY OF DAKOTA, *Minnehaha County,* } ss:

Ruthven B. Thompson, being duly sworn, on oath says he is the agent of the plaintiff in the above-entitled action, & further says that Charles Bates & Clark E. Bates, the defendants in the above-entitled action, are justly indebted to the City Bank, M[illegible]

Minnesota, in the sum of eight thousand three hundred & fifty-four $\frac{20}{100}$ dollars, and interest thereon — costs, over and above all discounts and set-offs, which said sum is now due; and that a cause of action exists therefor in favor of said plaintiff and against said defendants, amounting to the said sum of $8,354.20, the grounds of which are as follows: One promissory note for $931.08; one promissory note for $2,614.65; one promissory note for $1,600; one promissory note for $3,209.20; and that the defendants have
138 assigned, disposed of, and secreted their property with intent to defraud their creditors, and are about to remove their property from the Territory of Dakota with intent to defraud their creditors.

That the defendant——

RUTHVEN B. THOMPSON.

Subscribed and sworn to before me this 10th day of November, 1879.

CYRUS WALLS, *Clerk.*

Ex. "K." T. G. B.

139 Ex. "M."

2d Inventory of Property Attached.

CITY BANK MINNEAPOLIS, MINN., *vs.* C. BATES & SON.

One span white horses, harness, and wagon.
Four sacks oats.
One office desk & stool.
Two new doors.
Two common chairs.
Six stirring-plows, new.
One breaking-plow, new.

Nov. 20, 1879.

HENRY CALLENDER,
Sheriff Minnehaha Co., D. T.

Ex. M.

140 The evidence being closed the defendant's counsel submitted to the court and asked the court to give the following requests or instructions to the jury, which were refused by the court, as shown by his indorsement upon the margin thereof "refused," and to which the defendant duly excepted.

The instructions refused were as follows:

Farther, a dissolution of the partnership of C. Bates & Son and a division of the effects and moneys of the firm between the two members of the firm, Clark Bates and Charles Bates, would be, unless done with the consent of the firm creditors, void as against such creditors. No dissolution of any kind thus made can effect creditors rights, and if the said parties assumed to divide up their property and then set up individual claims of exemption to the same, such [illegible] be maintained as against firm creditors, for the firm

property or the proceeds thereof is just as liable for the joint debts after such a division as it was before. Again, when the benefit of the exemption law is claimed by a partnership and the right asserted thereunder to have the $1,500 set off to the claimants, as by law provided, it is incumbent on the debtors to submit to an appraisement of all their partnership property, and this without
141 reference to any division of the same made between themselves; and, after such appraisement made in the manner by law provided, it is their privilege to select, if over the limitation in value, the amount of fifteen hundred dollars in value, leaving the remainder subject to legal process; and, now, if the claimant debtors refused to have such appraisement, or if they kept back, detained, or concealed their personal property, or any part thereof, so that it could not be appraised, then they are not entitled to the benefit of the exemption law and their claim to the property taken on the writ of attachment by the officer may be disregarded. Refused.—J. P. Kidder, judge.

III. A debtor is insolvent, within the meaning of the law, when he is unable to pay his debts from his own means as they become due, and if it should appear to you from the evidence that the firm of Bates & Son were insolvent at the time of their alleged dissolution of partnership, then they had no right to make such dissolution and a division of their partnership property as against firm creditors, and any division of partnership property thus made is void as against such creditors, and all such property must remain
142 as partnership property, subject to the right of firm creditors, except that the partnership might claim one exemption of $1,500 in value out of said property; and if it should appear to you from the evidence that this plaintiff, as an individual, makes a claim of exemption in property which had been the property of Bates & Son, and was divided up by the partners just prior to the levy and seizure of the same by the sheriff on an attachment against the firm, then such claim cannot be maintained if said firm were insolvent as aforestated. Refused.—J. P. Kidder, judge.

You are further instructed that if it should appear to you from the evidence that the firm of C. Bates & Son, a partnership, dissolved and divided up among themselves their partnership property and moneys, and at the time of such division were insolvent, then, as against the creditors of said firm, such dissolution and division of property was void, and the partners cannot from the property so divided maintain the right or claim of individual exemptions to the amount of $1,500 each. The claim of exemptions, if any in said property, must have been a claim as a partnership, and the plaintiff cannot recover in this action. Refused.—J. P. Kidder, judge.

143 The court refused to give defendant's requests above, and to such refusal the defendant's counsel then and there duly excepted.

And the case having been argued by counsel for the parties, the court thereupon instructed the jury as follows:

GENTLEMEN OF THE JURY: This action was brought to recover damage for the wrongful conversion of certain personal property claimed by the plaintiff as exempt from sale on legal process, and the property is so claimed under that provision of our law which provides that a debtor may, in addition to certain enumerated articles deemed absolutely exempt, select from all other of his personal property goods, chattels, merchandise, money, or other personal property, not to exceed in the aggregate $1,500 in value. In order to give the debtor an opportunity to secure the benefit of this exemption the law requires that, in all cases of a levy upon
144 personal property by a sheriff, he must give notice thereof to the debtor or to some one of the persons therein named for him, and the debtor must thereupon claim or demand the benefit of his exemption within three days after such notice from the office.

No form of demand on the part of the debtor is required, only it should be a clear and distinct claim or demand on his part for the benefit of his exemptions.

Upon a claim for property as exempt by limitation of value, as in this case, the same is required to be determined by an appraisement made under the directions of the officer, which appears to have been made in this case in substantial compliance with the statute.

From an appraisement so made under the provisions of this law, if over $1,500, the debtor may select and retain the amount in value of $1,500, leaving the remainder, if any, subject to legal process.
145 (The two requests by defendant are given.)

I. This is an action brought by the plaintiff to recover damages against Henry Callender, charging that said defendant, pretending to act as sheriff of Minnehaha county, forcibly seized and carried away certain personal property then belonging to the plaintiff under and by virtue of a certain writ of attachment issued out of this court wherein The City Bank of Minneapolis was plaintiff and this plaintiff and another, Charles Bates, were named as defendants, and the property so seized and carried away the plaintiff claims was his property and exempt from such attachment. Given.—J. P. Kidder, judge.

The defendant answers admitting the allegations of the plaintiff as to his official character, and justifies the alleged taking under the writ of attachment mentioned, asserting that the property seized under and by virtue of the writ was partnership property belonging to the firm of C. Bates & Son, and that the said firm, after having claimed the benefit of the exemption law on behalf of said partnership in and to said property, failed and refused to submit to an appraisement of the whole of their personal property but detained and kept back a portion of the same from the appraisers chosen to make the appraisement.

146 II. Now, under the law of this Territory a partnership firm can claim one exemption of $1,500 in value and not a several exemption to each partner, or the alternative property so applicable, and if you should find from the evidence that the property, to recover the value of which suit is now brought, was at the time of the attachment levy partnership property of the firm of C.

Bates & Son and was purchased with money of said firm, or that they claimed the same and offered to have or did have the same appraised as partnership property, then this plaintiff cannot recover in this action, and your verdict should be for the defendant. Given.—J. P. Kidder, judge.

Now, the plaintiff claims that he was the owner of the property mentioned in the complaint at the time it was taken as his own individual property, and although some of it shortly before
147 may have belonged to the copartnership of C. Bates & Son, yet the member- of that firm, the court charges you for the purpose of this trial, had a legal right, upon a dissolution of the firm and a settlement between them, to divide and apportion their property and acquire each a specific portion thereof in severalty as his own separate property; and if you find from the evidence that the plaintiff did in fact acquire a portion of the property in question about October, 1879, from said firm, by agreement with his copartner, in consideration of certain other property retained by him out of the partnership property, and thereby became and was at the time of the levy the actual, *bona fide* owner thereof, then his ownership and title as to such portion cannot be impaired by the fact that it may have formerly belonged to said firm.

The written demand introduced in evidence in this case is sufficient in form under our law, and if you find from the evidence that this demand was about Nov. 11th, 1879, and within three days after the levy served upon the defendant on behalf of the plaintiff,
148 then this would be considered a sufficient compliance with the statute in regard to his claim for the benefit of his exemptions.

As — the appraisement in this case it was properly taken in the suit in which the attachment was issued.

And the rights of this plaintiff to the property in question are not to be impaired or affected by the fact that he was joined as a defendant with his late partner, Charles Bates, in the suit in favor of the City Bank, or by the further fact that the other property claimed by his codefendant was included in the appraisement in that suit.

The court further instructs you that if you find from the evidence that the plaintiff was the owner of the property in question in this case at the time it was seized upon the attachment, and that on or about Nov. 11th, 1879, and within three days after the levy, the plaintiff distinctly informed the defendant of his claim under the exemption law, and demanded the return of the property as
149 exempt, and that an appraisement of such property was duly had under the direction of the defendant, in substantial compliance with the requirement of the statute, as explained to you, and that by such appraisement the value of the property so claimed by this plaintiff was found to be less than $1,500.00, then the plaintiff is entitled to recover in this action.

If you do not so find your verdict should be for the defendant.

Upon the question of the value of the property in controversy the valuation contained in the appraisers' inventory is not to be regarded

by you as the proper measure of damages, but its value should be determined by all the evidence given on this trial.

And in case you find for the plaintiff, in considering the amount of damages, you are instructed that this is an action, not upon contract, but for an alleged wrong, or tort, as it is termed in law, and in such an action the measure of damage is the amount which will compensate the plaintiff for all loss or harm proximately caused by the wrong, whether it could have been anticipated by the parties at the time or not. Under this rule the plaintiff is entitled,
150 in the first place, to the value of the property at the time of the conversion, with interest at seven per cent. per annum from that time to the time of this trial, and also a fair compensation for his time, properly expended, in pursuit of the property, as shown by the evidence; and further, under the rule above given, in case you find that the plaintiff sustained any damages by re-son of having men and teams employed for carrying on his business, and that his business was broke- up by the wrongful act or conduct of the defendant, then the plaintiff is also entitled to damages for all actual loss caused by the delay of men and teams and the breaking up of his business, and by being deprived of the means of carrying on the same, as shown by the evidence.

And it is a further provision of the law that in an action of this kind, if the defendant has been guilty of oppression or malice, actual or presumed, the jury may, in addition to all the actual dam-
151 age, give damages for the sake of example, and by way of punishing the defendant for his wrongful conduct.

And, in this connection, if you find from the evidence that the defendant was satisfied it was his duty to return this property as exempt, and that he knowingly and wilfully refused to do so, whether of his own accord or instigated by others for whom he was acting, with the purpose and intent of vexing, annoying, harrassing, or oppressing the plaintiff, then, for such conduct in the matter, you may, in addition to all actual damages, give such damages, for the sake of example, as, in your discretion, may seem proper, not exceeding the amount of $1,500.00, claimed in the complaint.

J. P. KIDDER, *Judge.*

To the giving of which charge the defendant then and there duly excepted.

152 And the jury, having received the charge of the court, refused to consider of their verdict, and afterwards, on November 16th, 1882, returned into court their verdict as follows:

Plaintiff's Verdict.

CLARK E. BATES *vs.* HENRY CALLENDER.

We, the jury, find the issues in this case for the plaintiff, and assess his damage at the sum of fifteen hundred dollars.

GEORGE MILL, *Foreman.*

And within less than ten days thereafter, to wit, on the 20th day of November, 1882, defendant served upon plaintiff's attorney notice of his intention to move for a new trial, designating the grounds upon which the motion would be made; and subsequently, on the 22d day of Nov., 1882, the defendant filed his said motion for a new trial & notice of intention as follows:

153 TERRITORY OF DAKOTA, *Minnehaha County:*

In District Court.

CLARK E. BATES, Pl'ff, *vs.* HENRY CALLENDER, Def't.

To Messrs. Winsor and Sweazey, pl'ff's att'ys:

Please take notice that the defendant herein intends to move the court to vacate and set aside the verdict rendered in the above cause, and to grant a new trial upon the following grounds:

First. The proof showed that the firm of Bates and Son claimed as exempt the property described in the complaint.

Second. The evidence showed that the alleged dissolution of copartnership of Bates and Son was not a *bona fide* transaction, but was merely formal, without any actual change of possession of the property.

Third. The evidence did not show that any notice of the alleged dissolution was ever communicated to the creditor, the City Bank of Minneapolis.

Fourth. The evidence showed that Clark E. Bates was not,
154 in fact, the owner of the said property in the complaint described.

Fifth. The evidence showed that the firm of Bates and Son agreed and submitted to an appraisement of said property as firm property, and, therefore, plaintiff was not entitled to recover in his individual capacity.

Sixth. Excessive damages, appearing to have been given under the influence of passion or prejudice.

II. Errors in law occurring at the trial and excepted to by defendant, viz:

(1.) The court erred in instructing the jury that although some of this property shortly before may have belonged to the copartnership of C. Bates and Son, yet the members of that firm (the court charges you for the purposes of this trial) had a legal right, upon the dissolution of that firm and a settlement between them, to divide and apportion their property, and require each a specific portion thereof, in severalty, as his own separate property, and the court erred in giving the instruction next following, beginning with the words "And if you find from the evidence" and ending with the words "belonged to said firm."

155 (3.) The court erred in giving the instruction beginning with the words "The written demand" and closing with the words "the benefit of his exemption."

(4.) The court erred in giving the instruction following, beginning

with the words "As to the appraisement" and ending with the words "appraisement in that suit."

(5.) The court erred in giving the instruction following, beginning with the words "The court further instructs you that if you find" and ending with the words "entitled to recover in this action."

(6.) The court erred in giving the instruction commencing with the words "And in case you find for the plaintiff" and ending with the words "in pursuit of the property as shown by the evidence."

(7.) The court erred in giving the instruction beginning with the words "And further under the rule" and ending with the words "the same as shown by the evidence."

(8.) The court erred in giving the instruction commencing with the words "And it is further" and closing with the words "for his wrongful conduct."

(9.) The court erred in giving the instruction commencing
156 as follows: "And in this connection" and ending with the words "claimed in the complaint."

(10.) The whole charge of the court as given tends to advise the jury that the plaintiff in this action had a right to claim as exempt the property in the complaint described and without reference to the proofs made, as to the same being partnership property of the firm of C. Bates and Son, and the same is misleading, as applied to the evidence in the case.

(11.) The court erred in giving the instruction commencing "Upon the question of the value" and ending with the words "on this trial."

(12.) The court erred in refusing to give the instructions and requests asked by defendant as the same are indicated and marked refused on the minutes of the court, viz., 3, 4, 5, & 6.

(13.) The court erred in refusing to submit to the jury the special findings No. 1 & 2 asked by the defendant.

(14.) The court erred in changing the verdict of the jury by striking out a portion thereof, to wit, the words "and costs."

Said motion will be made upon the minutes of the court.

WILKES AND WELLS,
Att'ys for Def't.

157 Judgment was thereupon, on Dec. 1st, 1882, entered for the sum of $1,528.75, in favor of plaintiff against said defendant.

And upon the agreement of plaintiff and defendant, entered upon the minutes of the court, the hearing of this motion was continued until the Lincoln term of district court at Canton, D. T.

The motion for a new trial having been presented, and the court having duly considered the same, it was by the court overruled and the defendant excepted, and time within which to present & serve a bill of exceptions was by agreement of counsel granted until the 16th day of Feb., 1883; and because none of said exceptions so offered & made to the opinion & decision of the said court do appear upon the record of the said trial therefore these exceptions are settled & made a part of the record in said action this 16th day of Feb., 1883, in said district.

JUDGE: I have examined the foregoing bill and am satisfied with it as now presented.

L. S. SWEZEY,
Of Pl'ff's Att'ys.

158 *Notice of Appeal from Judgment.*

TERRITORY OF DAKOTA, } ss:
4th Judicial District, }

In the District Court in and for the County of Minnehaha.

CHARLES BATES, Pl'ff, *vs.* HENRY CALLENDER, Def't.

Please to take notice that the defendant in the above-entitled action appeals from a judgment entered therein on the 29th day of May, 1882, in favor of the plaintiff against the defendant for ten hundred & forty-eight dollars and seventy cents to the supreme court of the Territory.

Yours, &c.,

WILKES & WELLS,
Attorneys for Defendant.

To Messrs. Winsor & Swezey, Esqs., attorneys for pl'ff, and Cyrus Walls, Esq., clerk of the district court of the county of Minnehaha.

Due service admitted this 9th day October, 1882.

WINSOR & SWEZEY,
Att'ys for Pl'ff.

Due service admitted this 9th day October, 1882.

CYRUS WALLS,
Clerk Dist. Court.
By B. M. AVERY,
Deputy Clerk of District Court for Minnehaha County.

159 TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

District Court.

CLARK E. BATES *vs.* HENRY CALLENDER.

TERRITORY OF DAKOTA, } ss:
Fourth Judicial District, }

I, J. P. Kidder, judge of the district court within and for the county of Minnehaha, in said district, before whom the above-entitled action was tried, do hereby certify that the foregoing paper, to wit, the summons, complaint, answer, verdict, judgment, and bill of exceptions, are contained in and constitute the judgment- roll in said action and the whole of the judgment therein.

J. P. KIDDER, *Judge.*

160 *Argument of Errors.*

I. The court erred in refusing to give the defendant's request- I, II, and III.

II. The court erred in giving the instructions excepted to by defendant.

III. Error in overruling defendant's motion for a new trial.

IV. The evidence is insufficient to sustain the verdict:

(1.) The evidence shows that the firm of Bates & Son, as a partnership, accepted of an appraisement as a firm.

(2.) The evidence shows that the firm of Bates & Son are the owners of a portion of the property claimed bythe plaintiff.

(3.) All the evidence shows the alleged dissolution was without consent of firm creditors, and that the firm of Bates & Son was at the time insolvent.

161 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

Fourth Judicial District.

I, Cyrus Walls, clerk of the district court within and for the county of Minnehaha, in the fourth judicial district of the Territory of Dakota, do hereby certify that the above and foregoing is a full, true, correct, and complete transcript and copy of the notice of appeal and proof of service thereof, of the judgment-roll, and of the certificate of the judge in the above-entitled action, wherein Clark E. Bates is plaintiff and Henry Callender is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 12th day of April, A. D. 1883.

[SEAL.] CYRUS WALLS, *Clerk.*

162 [Endorsed:] In supreme court, Territory of Dakota. No. 140. Clark E. Bates, respondent, *vs.* Henry Callender, appellant. Filed April 14th, 1883. B. S. Williams, clerk.

163 TERRITORY OF DAKOTA, *ss:*

In Supreme Court of the Territory.

CLARK E. BATES, Respondent,
vs.
HENRY CALLENDER, Appellant.

To Wilkes & Wells, attorneys for appellants:

Please take notice that upon the statement served herewith we will, on the 24th day of May, 1883, at the hour of 9 o'clock a. m., or as soon thereafter as counsel can be heard, at the court-house, in the city of Yankton, D. T., before B. S. Williams, clerk of said court, apply to the clerk to tax the respondent's costs herein, at which time and place you can appear if you see fit so to do.

WINSOR & SWEZEY,
Attorneys for Respondent.

164 *Respondent's Costs and Disbursements.*

TERRITORY OF DAKOTA:

CLARK E. BATES, Respondent,

vs.

HENRY CALLENDER, Appellant.

Costs of printing brief	$11 25
" " add. abstract	12 50
	$23 75
Fees, clerk of the supreme court	9 55
	$33 30
The above bill of costs and disbursements taxed and allowed at	$23 75
And clerk's fees, supreme court	9 55

Dated May 25, 1883.

B. S. WILLIAMS, *Clerk.*

TERRITORY OF DAKOTA, } ss:
County of Minnehaha, }

L. S. Swezey came personally before me, and having first been duly sworn, deposeth and says that he is one of the attorneys of said respondent in the above-entitled action; that the above bills and items of costs and disbursements therein are just and correct, and have been or will be necessarily incurred in said action.

L. S. SWEZEY.

Subscribed and sworn to before me this 19th day of May, A. D. 1883.

[SEAL.]

W. P. CARR,
Notary Public.

165 [Endorsed:] Supreme court. Clark E. Bates *vs.* Henry Callender. Affidavit of disbursement. Filed in the office of the clerk of said supreme court the 22 day of May, 1883. B. S. Williams, clerk. Winsor & Swezey, respondent's attorneys, Sioux Falls, Dakota Territory.

Service by a copy, this 19th day of May, 1883, admitted.

WILKES & WELLS.

166 Supreme Court, Territory of Dakota. May Term, A. D. 1883.

CLARK E. BATES, Plaintiff and Respondent,

vs.

HENRY CALLENDER Defendant and Appellant.

Appeal from the district court of the county of Minnehaha.

Messrs. Wilkes & Wells for the appellant; Messrs. Winsor & Swezey for the respondent.

KIDDER, *J.:*

This action was brought by Clark E. Bates against Henry Callender, as sheriff of Minnehaha county, for the wrongful detention and conversion of personal property claimed by the plaintiff as exempt. The cause of action is predicated upon sec. 324, Code of Civil Procedure, providing for the exemption of personal property, not to exceed $1,500 in value, to be selected and appraised as prescribed in secs. 326 to 331, inclusive.

167 The answer seeks to justify by virtue of a warrant of attachment issued from the district court in an action by the city bank of Minneapolis against the plaintiff and one Charles Bates, alleging that the defendants in that action were, shortly before the levy, copartners under the name of C. Bates & Son; that said action was founded upon certain notes of the firm, and that the property seized was the property of said firm and not the property of the plaintiff, and further alleging that after the levy the defendant therein agreed to a partnership appraisement; that they detained from the appraisers other property and refused to have all their property appraised.

As a further defense, the answer alleged that shortly before the levy the plaintiff and said Charles Bates, as copartners, being insolvent, sold and disposed of a portion of their property, dissolved the firm, and made a division between themselves of the residue of their property with intent to defraud their creditors, and that the property in question was in fact the property so divided.

The trial resulted in a verdict and judgment in favor of the plaintiff for $1,500.

168 The firm of Bates & Son was dissolved on October 21st, 1879, and a formal notice of dissolution published in one of the local newspapers for three weeks, ending on November 5th, 1879, prior to the commencement of the action in which the attachment was issued, and that upon the dissolution and settlement the plaintiff, by agreement with his partner, received as his individual property $500 or $600 in money and a team, harness, and wagon. With this money the plaintiff purchased the two loads of provisions, which, with the wagon, were the property in question.

The evidence also tended to show that at the time of such dissolution said firm was indebted to various creditors and was insolvent.

On the same day the property was attached the plaintiff caused to be served on the defendant as sheriff a claim in writing for his

exemptions, demanding also the return of said property. Two days later an appraisement was had under the statute, and the proceedings therein, as shown by the record, are entitled in the action wherein the warrant of attachment was issued. These proceedings appear to have been taken in substantial compliance with the statute.

169 (1.) There is first a notice on behalf of the plaintiff bank returned served by the sheriff on Clark E. Bates by delivering to him a copy thereof on November 13th, 1879.

(2.) Also an oath of three appraisers, described as disinterested citizens of the county, reciting that one of them was selected by the defendants, one by the plaintiff, and the other by those two persons, and taken and subscribed before the sheriff on the same day, to the effect that they would truly, honestly, and impartially appraise the property of said debtors.

(3.) And, lastly, a return, signed by the sheriff and appraisers, with an inventory annexed, in which they certify that the inventory is a true one of all the property seized by the sheriff in the action, and the value of each article of personal property as the same has been appraised by us.

In the inventory the items identified as the property in question are set down (on page one) as follows:

One old lumber wagon	$25 00
One set of new harness	$25 00
Contents of two loaded wagons	$236 00

170 The evidence also tends to show that after the appraisement was completed several further requests were made on behalf of the plaintiff for the return of the property, and some assurances given by the sheriff that it would be returned. Finally, upon receiving an indemnifying bond, he decided to hold the property.

171 I. Before considering the exceptions chiefly relied on by the appellant, we will examine the assignment of error relating to the ownership of the property in question and the appraisement of the same. Upon both these points the question was one of fact for the jury, and appears to have been fully submitted to their determination.

It has become well settled in the States where statutory provisions for a partnership exemption do not exist that an individual cannot claim an exemption out of unsevered partnership property.

Bonsal *vs.* Comly, 44 Pa. St., 442.
Pond *vs.* Kimball, 101 Mass., 105.
Gaylord *vs.* Inshoff, 26 Ohio St., 317.
Russell *vs.* Lannon, 39 Wis.
Guptil *vs.* McKee, 9 Kan., 30.
State *vs.* Spencer, 64 Mo., 355.

To the same effect are the Tennessee and Nebraska cases cited by the appellant's counsel from the American Reports.

And although the statute of this Territory expressly allows one

partnership exemption out of partnership property, there is nothing in the statute indicating an intention to allow a several
172 exemption out of partnership property; and, indeed, the language would seem to exclude such a construction.

"A partnership firm can claim but one exemption of fifteen hundred dollars in value * * * out of the partnership property, and not a several exemption for each partner." Sec. 333.

Therefore the question of fact was involved in this action whether the property when taken was the property of the plaintiff, *or the property of the plaintiff*, or the property of the late firm of C. Bates & Son. But this precise question was fully submitted to the jury, under an instruction requested by the defendant (number two given) that if the jury should find from the evidence that the property was at the time of the levy partnership property of the firm of C. Bates & Son, or was purchased with the money of said firm, * * * then the plaintiff cannot recover. And in a subsequent portion of the charge, the court bases the right of recovery upon a finding by the jury that the plaintiff was at the time of the levy the actual, *bona fide* owner of the property. Thus submitted, the verdict
173 of the jury must be conclusive on this question, and the record presents abundant evidence to support the verdict in this respect.

Concerning the appraisement of the property we reach the same conclusion. The evidence is very slight, if, indeed, there is any, tending to show a partnership appraisement, as claimed by appellant; the record evidence discloses nothing tending to show such an appraisement. The action in which the attachment was issued being founded upon an indebtedness for which the plaintiff was liable, jointly and severally, with his late partner, was necessarily against both as defendants, but this did not continue or renew their former partnership relations; nor did the fact that other property, claimed by his codefendant, was taken upon the same warrant and appraised by the same appraisers, determine the appraisement to be a partnership appraisement, especially in view of all the other evidence in the case. The defendant says in his direct testimony that after some talk "an appraisement was made as partnership property that I made return on." But an examination of his return does
174 not show any appraisement as partnership property, and his remarks must be taken in connection with his admissions on the stand that the plaintiff did not interfere or take any part in the appraisement, but stood by claiming a separate exemption." Moreover the statute provides that such an appraisement must be made "under the direction of the sheriff or other officer." Sec. 326.

But, upon all the evidence on this subject, the question was submitted to the jury, and in the same instruction above referred to, given at the request of the defendant, the jury were plainly instructed that if the firm of C. Bates & Son claimed the property, and offered to have or did have the same appraised as partnership property, then the plaintiff could not recover in this action. On this issue, therefore, if the evidence tends to show any partnership appraisement the verdict of the jury is decisive against the defendant.

175 II. The principal contention, however, on the part of the appellant arises upon the refusal of the court below to instruct the jury, as requested, respecting the right of the firm of Bates & Son, as against their creditors, to dissolve and apportion their partnership property, and the right of the plaintiff to acquire in severalty portions of such property.

The proposition is thus stated in defendant's third request, refused by the court:

"If it should appear to you from the evidence that the firm of Bates & Son were insolvent at the time of their alleged dissolution of partnership, then they had no right to make such dissolution, and a division of their partnership property, as against firm creditors, thus made is void, and all such property must remain as partnership property, subject to the rights of firm creditors, except that the partnership might claim one exemption of $1,500 in value out of said property; and if it should appear to you from the evidence that this plaintiff, as an individual, makes a claim of exemption in property which had been the property of Bates & Son and was divided
176 up by the partners just prior to the levy, * * * then such claim cannot be maintained, if said firm was insolvent, as above stated."

This proposition was reiterated in the other requests refused, and presents the question for our decision.

Whether this statement of the law can be maintained in its full import in a case where creditors have obtained by legal remedies a lien upon partnership property, or where it is within the control of a court of equity or a probate or bankruptcy court for due application or distribution, we do not now decide. It will be observed that the proposition advanced is not based upon actual fraud, but would have the court declare the dissolution of a firm and the division of its effects, when insolvent, a legal or constructive fraud.

But we are clearly of the opinion that such a doctrine has no just application in a case involving a debtor's right to his lawful exemptions out of his individual property, although it may formerly have belonged to a partnership of which he was a member. In the case of Worman *vs.* Giddy, 30 Mich., 151, the proposition is
177 squarely decided against the appellant. The facts in the case are strikingly similar to those in the one at the bar, and Graves, A. J., in the opinion says: "Until legal proceedings, adopted to bind the property, were had the owners were not precluded from reducing their joint holding to separate ones, and the evidence for the plaintiff went to show that the joint interest was severed, and the whole right in these goods vested in the plaintiff, not only before the seizure on the execution, but previous to the commencement of the suit.

"The fact that the property had been some time before held by the plaintiff and Penrose as partnership property was of no consequence, in so far as the right of exemption was concerned.

"That circumstance could not have the effect to impress upon the property a permanent quality or character by which it would continue forever subject to be treated as firm property.

"By the division the plaintiff became separate owner prior to
178 the suit brought by Lichtenberg & Sons, and his right to hold under the exemption laws was not made abortive by reason that the property came to him from the firm and was taken by defendant on a debt of the firm."

In a late case in the supreme court of Ohio, Mortley *vs.* Flanagan, just reported, but not published, I find in the opinion the following: "Where the members of a firm acting in good faith dissolve the partnership, and one member sells his interest in the partnership property to the other, the latter will not be deprived of the right to hold such property exempt from the payment of a debt theretofore asserted against him on the ground that such debt was a partnership debt due at the time of dissolution, nor will the fact that the partners knew the firm to be insolvent at the time of such dissolution make any difference." The case in the 30 Mich., *supra*, is cited therein with approval.

There are certain well-defined principles of law which entirely support the authority of this case. A partnership is in law one
179 person, and has the same control and dominion over its affairs as any other person, and the law knows no way to prevent the dissolution of a copartnership, and until firm creditors have acquired a lien upon partnership property, or it has passed into *custodia legis*, the law knows no way to prevent the disposition of the same by the firm itself.

Case *vs.* Beauregard, 99 U. S., 119.

In the case the court say: "So if, before the interposition of the court is asked, the property has ceased to belong to the partnership, if by a *bona fide* transfer it has become the several property, either of one partner or of a third person, the equities of the partners are extinguished, and, consequently, the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced," citing many cases.

Day *vs.* Wetherby, 29 Wis., 363.

Atkins *vs.* Saxton, 77 N. Y., 195.

In the latter case it is held that a division of partnership property
180 and a transfer by one of the partners to the other in proportion to their several interests for the purpose of preventing the seizure thereof by the individual creditors of the insolvent partner is not unlawful, and that an intent to defraud creditors cannot be predicated of an equitable division of partnership property.

From these general principles, decided in analogous cases, we come to the precise question in this case: Is it the reasonable doctrine of the law that the mere dissolution of an insolvent firm and the division of its assets, accomplished without actual fraud, even though it be done for the purpose of securing to the members of the firm the benefit of individual exemptions, would amount to such a legal or constructive fraud as to deprive the debtors of such exemptions?

We think such is not the legal result. Exemption laws are beneficial in their character, are intended for the benefit of the debtor class and their families, and should be fairly and liberally construed. Wilson *vs.* Hawley, 31 N. Y., 648; Newton *vs.* Howe, 29 Wis., 531; Kuntz *vs.* Kinney, 33 Wis., 570; Rosenthal *vs.* Scott, 41 Mich., 632; O'Donnell *vs.* Segar, 25 Mich., 367.

And, within the terms and limits of an exemption law, any acquisition of property, or exchange of property into property which is exempt, is entirely lawful. See the case in 25 Mich., above
181 cited. And, within the same principle, exempt property is not susceptible of a fraudulent alienation or disposition. Bump on Fraudulent Conveyances, 242, and many cases cited; Derby *vs.* Weyrich, 8 Neb., 174; Pike *vs.* Miles, 23 Wis., 164; Wilson *vs.* Hawley, 31 N. Y., *supra*.

Upon the authority of Woman *vs.* Giddy, *supra*, and the cases now referred to, and considering the character and object of exemption laws, we are led to the conclusion that the district court did not err in refusing the defendant's requests and in charging the jury that the members of the firm of Bates & Son had a legal right, upon a dissolution of the partnership, "to divide and apportion their property and acquire each a specific portion thereof, in severalty, as his own separate property; and if they should find from the evidence that the plaintiff did in fact acquire a portion of the property in question, about October, 1879, from said firm by agreement with his copartner, in consideration of certain other property retained by him out of the partnership property, & thereby became and was at the time of the levy the actual *bona fide* owner thereof, then his ownership and title as to such portion cannot be impaired by the fact that it may have formerly belonged to said firm."

182 The second request refused was also inappropriate in assuming that a partnership exemption was claimed in the case and in asking an instruction beyond the case regarding the rights and duties of a partnership under the exemption law.

III. In the same request this instruction was requested:

"If the debtors kept back, detained, or concealed their personal property, or any part thereof, so that it could not be appraised, then they are not entitled to the benefit of the exemption law, and their claim to the property taken on the writ of attachment by the officer may be disregarded."

This request is objectionable in referring to the alleged acts or conduct of "the debtors," meaning, we suppose, the defendants in the attachment, and not to any acts or conduct of the plaintiff himself; nor are we able to find in this record any evidence that the plaintiff detained or concealed any of his property.

But, as the learned counsel for appellant have in argument insisted upon the proposition intended by the request, we will briefly consider the same. We are aware that in some of the decisions expressions of opinion are to be found which would seem to countenance the doctrine contented for by counsel. The assertion
183 is that, any detention or concealment of personal property by a debtor so as to hinder or defeat a levy or any appraisement

by the proper officer, is in effect a selection of such property, and as to other property to that extent operates as a waiver of the benefit of the statute. Such a result might follow under a statute or system of laws making a writ a lien generally upon all the debtor's personal property within the jurisdiction of the officer, or making it the duty of the debtor, when demanded by the officer, to surrender property in satisfaction of the writ.

But such is not the effect of our statute on the subject. Our statute concerning the levy and execution of the same expressly declares that "no writ of execution shall be a lien on personal property before the actual levy thereof." Sec. 317. The same section allows the officer, after having made one levy, at any time thereafter within the lifetime of the execution to make other levies if he deems it necessary. The same must be true in the case of the levy of an attachment. In the execution of such a warrant the officer is required to "seize" and "take" into his custody "the personal property of the debtor." Secs. 202–204. In all cases the officer is specifically authorized to levy upon any and all goods, chattels, moneys, and other
184 property, both real and personal, not exempt by law, and is directed by the statute in detail as to the method and manner of levy and sale; but we find no provision of the statute making legal process in any form a lien on personal property before the actual levy thereof, or making it the duty of the debtor to seek out the officer and surrender to him property on such process.

In order to protect the debtor in his exemptions, however, the statute provides:

"In all cases of a levy upon personal property by a sheriff, constable, or other officer he must give notice thereof to the debtor (or to certain persons named for him), and the debtor, or such other person for him, must claim or demand the benefit of these exemptions within three days after such notice from the officer, and said notice of levy may be by copy or by reading." Sec. 331.

As, therefore, all property not absolutely exempt is, under our law, *prima facie* subject to levy, and the authority of the officer is ample and his duties plainly marked out, this court must hold that the debtor has no duty to perform, in the surrender of property
185 upon legal process, until actual levy, and in the assertion of his exemptions against such process has no part to perform until he receives notice of the levy, as required by the statute.

And inasmuch as the appraisement provided for in the exemption law is only for the purpose of determining the valuation of the property and to enable the debtor to select his exempt property, within the limitation in value, and must necessarily succeed the levy and notice of the levy, we cannot hold that the debtor should anticipate the levy or do any act to extend the levy, nor that the appraisement should extend to property not in the custody of the officer. The officer may make new levies, extend the levy from time to time over sufficient property to satisfy the writ, but until a levy there is no occasion and no foundation for appraisement proceedings to determine the limitation in value under the exemption law.

In view of our statute law, therefore, this request, which in effect

required the court to advise the jury that the mere detaining or concealing by a debtor of any part of his personal property not levied upon or in the custody of the officer so that it could
186 not be appraised would in law deprive him of the benefit of his exemptions, was incorrect and properly refused by the court below.

Whether actual obstruction of the levy or concealment of property to prevent a levy might in any case operate as a solution by the debtor, under the exemption law, we do not decide; but we hold that a levy and a notice thereof must precede the claim for exemptions as well as the appraisement which is to carry out this claim for exemptions, and that the request was erroneous.

That the concealment of property from the officer is no defense against a claim for exemptions is distinctly held in Megehe *vs.* Draper, 21 Mo., 510, and Elder *vs.* Williams, 16 Nev., 416.

IV. As to the assignment of error in reference to the amount of damages there is no error for review by an appellate court. It is conceded that the recovery was several hundred dollars more than the actual damage as proved, but no exceptions appears to the charge of the court on the question of damages, except as to the valuation of the appraisers not being the measure of damages, and this
187 was not referred to on argument. The instruction, however, on this question was proper, and it is so held concerning an appraiser's valuation under a similar statute in Iowa—Flanigan *v.* Uzeeler, 9 N. W. Rep., 381; and our statute provides that the appraisement for exemption purposes must be made "at the usual price of such articles at sheriff's sale, as near as can be ascertained." Sec. 328. This is manifestly an improper measure of value in action for conversion.

There being no valid objection, then, to the charge of the court on the question of damages, the amount of the recovery was entirely with the jury. There was evidence of hardship upon the plaintiff, and evidence from which malice and oppression on the part of the defendant, under the color of authority and misconduct in office, may have been inferred by the jury, for which, under the charge of the court, exemplary damages may have been given.

No error appearing in the record, the judgment of the court below is affirmed.

All the justices concurring.

[Endorsed:] Supreme court. May term, 1882. Clark E. Bates, respondent, *vs.* Henry Callender, appellant. Opinion. Kidder, J. Filed in open court this 30th day of June, 1883. B. S. Williams, clerk.

188 Be it remembered that at a term of the supreme court of the Territory of Dakota, begun and held at the capitol, in Yankton, the seat of government of said Territory, on the second Tuesday, to wit, on the eighth day, of May, A. D. 1883, on the 4th day of the term, to wit, on the 11th day of May, A. D. 1883.

Present: Alonzo J. Edgerton, chief justice; Sanford A. Hudson,

William E. Church, and J. P. Kidder, associate justices of said court.

The following proceedings were had, to wit:

Appeal from the District Court of Minnehaha County.

CLARK E. BATES, Respondent,
vs.
HENRY CALLENDER, Appellant. } No. 140.

And, now, this 11th day of May, 1883, the above cause coming on for argument and hearing in its order on the calender, *and* argued by Wilks, Esq'r., for appellant, and by L. S. Swezey, Esq'r., for respondent, and thereupon submitted to the court.

189 *Appeal from the District Court of Minnehaha County.*

THE UNITED STATES OF AMERICA, }
Territory of Dakota, } *ss:*

In the Supreme Court. May Term, 1883.

CLARK E. BATES, Plaintiff and Respondent,
vs.
HENRY CALLENDER, Defendant & Appellant. } No. 140.

This action coming on to be heard at the May, A. D. 1883, term of said supreme court at the supreme court room, in the city of Yankton, D. T.—

Present: A. J. Edgerton, chief justice, and Wm. E. Church, J. P. Kidder, and S. A. Hudson, associate justices; and the appeal herein having been argued by Messrs. Wilkes and Wells, for the appellant, and by Messrs. Winsor and Swezey, for the respondent, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the said district court within and for said Minnehaha county, appealed from herein, be, and the same is hereby, affirmed; and it is further ordered that this cause be, and it is hereby, remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that plaintiff and respondent have and recover of the defendant & appellant his costs and disbursements on this appeal expended, taxed and allowed at thirty-three $\frac{30}{100}$ dollars ($33.30).

By the court:

A. J. EDGERTON,
Chief Justice Supreme Court, D. T.

All the justices concurring.

[Endorsed:] In supreme court, Territory of Dakota. May term, 1883. Clark E. Bates, plaintiff & respondent, *vs.* Henry Callender, defendant & appellant. Filed this 14th day of May, 1883. B. S. Williams, clerk.

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190 The court being duly opened on the 30th day of June, A. D. 1883, on the 7th day of the May term, A. D. 1883, the following proceedings were had, to wit:

CLARK E. BATES, Respondent,
vs.
HENRY CALLENDER, Appellant.

Opinion of the court in the above-entitled cause by Kidder, justice, announced and filed and entered of record this 30th day of June, 1883.

191 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

To the honorable justices of the Supreme Court of the United States:

And now comes Henry Callender, of the Territory of Dakota, by Wilkes & Wells, his attorneys, and complains that in the records and proceedings and also in the rendition of final judgment by the supreme court of the Territory of Dakota, in a suit between Clark E. Bates, respondent, and said Henry Callender, appellant, affirming a judgment of the district court of the fourth judicial district of said Territory in and for Minnehaha county, rendered against him at the November term thereof, A. D. 1882, on the first day of December, A. D. 1882, for the sum of one thousand five hundred and twenty-eight dollars and seventy-five cents, which judgment, upon appeal, was, at the May term, A. D. 1883, of said supreme court of the Territory of Dakota, on the 14th day of May, A. D. 1883, by final judgment of said court, affirmed, manifest error hath intervened, to the great damage of the said Henry Callender.

Wherefore he prays for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

WILKES & WELLS,
Attorneys for Henry Callender.

192 The foregoing petition is approved and the writ of error prayed for therein is allowed this 20th, day of October, A. D. 1883.

A. J. EDGERTON,
Chief Justice of the Supreme Court of Dakota.

193 UNITED STATES OF AMERICA, } ss:
Territory of Dakota, }

The President of the United States of America to the judges of the supreme court of the Territory of Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment in a plea which is before you in said supreme court, between Henry Callender, plaintiff in error, and Clark E. Bates, defendant in error, affirming a judgment rendered against him in the district court of the fourth judicial district of the Territory of Da-

kota for Minnehaha county, a manifest error hath happened, to the great damage of the said Henry Callender, as by his complaint appears, and it being fit that the error, if any there has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby command, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceeding aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1884, in the Supreme Court to be then and there held, that, the record and proceedings being in-
194 spected, the said Supreme Court may cause further therein to be done to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 23d day of January, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the one hundred and — year.

[Seal Supreme Court of Dakota Territory.]

B. S. WILLIAMS,
Clerk of the Supreme Court of the Territory of Dakota.

195 UNITED STATES OF AMERICA, *ss:*

To Clark E. Bates, Greeting:

You are hereby cited and admonished to be and appear at a supreme court of the United States to be held at Washington on the second Monday in October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Dakota, wherein Henry Callender was plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. A. J. Edgerton, chief justice of the supreme court of the Territory of Dakota, this 23d day of January, in the year of our Lord one thousand eight hundred and eighty-four.

A. J. EDGERTON,
Chief Justice.

196 TERRITORY OF DAKOTA, } *ss:*
County of Minnehaha, }

R. J. Wells, being first duly sworn, deposes and says that he is a resident of said county, and is one of the attorneys for Henry Callender, appellant named in a certain action lately pending in the supreme court of the Territory of Dakota, in which the said Clark E. Bates was plaintiff and respondent and said Henry Callender was defendant and appellant, wherein, at the May term of said court, A. D. 1883, the judgment of the district court was affirmed; that said judgment so affirmed was recovered by the said Clark E. Bates against said Henry Callender in the district court for Minnehaha